(13)

No. 95-354-CFX
Status: GRANTED

Title: James O'Connor, Petitioner
v.
Consolidated Coin Caterers Corporation

Docketed:
August 29, 1995

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Daly,George

Counsel for respondent: Spears Jr.,James B.

NOTE: Opinion originally issued 4-21-95. Ptn mld 8-29-95, see ml label redkt dt.

Entry	Date	Note	Proceedings and Orders
1	Aug 29 1995	G	Petition for writ of certiorari filed.
2	Sep 29 1995		Brief of respondent Consolidated Coin Caterers Corp. in opposition filed.
3	Oct 11 1995		DISTRIBUTED. October 27, 1995 (Page 12)
5	Oct 30 1995		REDISTRIBUTED. November 3, 1995 (Page 12)
7	Nov 6 1995		REDISTRIBUTED. November 9, 1995 (Page 13)
8	Nov 13 1995		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
9	Dec 14 1995		SET FOR ARGUEMNT TUESDAY, FEBRUARY 27, 1996. (1ST CASE).
10	Dec 14 1995	G	Motion of petitioner to dispense with printing the joint appendix filed.
11	Dec 28 1995		Brief of petitioner James O'Conner filed.
12	Dec 28 1995		Brief amici curiae of American Association of Retired Persons, et al. filed.
13	Dec 28 1995		Brief amici curiae of United States and Equal Employment Opportunity Commission filed.
14	Jan 4 1996		CIRCULATED.
15	Jan 8 1996		Motion of petitioner to dispense with printing the joint appendix GRANTED.
16	Jan 11 1996	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Jan 22 1996		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
18	Jan 29 1996		Brief amicus curiae of National Retail Federation filed.
20	Jan 30 1996	X	Brief amicus curiae of New England Legal Foundation filed.
19	Jan 31 1996	X	Brief amici curiae of Maryland, et al. filed.
21	Jan 31 1996	X	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
22	Jan 31 1996	X	Brief amicus curiae of Equal Employment Advisory Council filed.
23	Feb 1 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fourth Circuit (SEALED 4THCIR. JOINT APPENDIX)
24	Feb 1 1996	X	Brief of respondent Consolidated Coin Caterers Corp. filed.
25	Feb 20 1996	X	Reply brief of petitioner John O'Connor filed.

APP

No. 95-354-CFX

Entry	Date	Note	Proceedings and Orders
26	Feb 20 1996	X	Reply brief of petitioner filed.
27	Feb 27 1996		ARGUED.

(1)

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

JAMES O'CONNOR,

Petitioner,

vs.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff alleging discriminatory discharge under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* (ADEA), may satisfy the fourth element of the *McDonnell-Douglas* prima facie case paradigm by showing that he was replaced by a younger person or that a younger person was retained in a similar position, or must show that he was replaced by someone outside the protected class.

2. Whether the Circuit Court fundamentally altered the requirements for proof of motive in holding that petitioner failed to make out a prima facie case of age discrimination based on direct and indirect evidence because (a) the decisionmaker's statement that petitioner was "too damn old for this kind of work" was not made in the context of replacing petitioner and (b) other statements of age animus by the decisionmakers were not made in the context of terminating petitioner.

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No. _____

In The

Supreme Court of the United States

October Term, 1995

JAMES O'CONNOR,

Petitioner,

vs.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, James O'Connor, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered June 8, 1995.

OPINIONS BELOW

The District Court opinion, App. 24-35, is reported at 829 F. Supp. 155 (W.D.N.C. 1993). The Circuit Court opinion, App. 1-23, is reported at 56 F.3d 542 (4th Cir. 1995).

JURISDICTION

The Circuit Court rendered its first opinion in this case on April 21, 1995. This opinion was not published. Petitioner moved for rehearing and suggested rehearing in banc in apt time. On May 31, 1995, the Court denied the Petition for Rehearing and declined the Suggestion of Rehearing in Banc. App. 36-37. On June 8, 1995, a new opinion issued and was published. App. 1-23, 56 F.3d 542.[1] This is the judgment sought to be reviewed. The mandate issued the same day. App. 38. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fourth Circuit by Writ of Certiorari pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, provides in pertinent part:

> §623. Prohibition of age discrimination.
>
> (a) Employer Practices. It shall be unlawful for an employer:
>
> (1) to . . . discharge any individual . . . because of such individual's age.

[1] This opinion differs from the earlier opinion only in that (1) it is published, (2) Judge Butzner amplified his dissenting opinion, and (3) Judge Luttig concurred in the Court's opinion rather than, as previously, concurring only in the judgment.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Western District of North Carolina, Charlotte Division, on August 27, 1991, seeking remedies under the ADEA. The District Court had subject matter jurisdiction pursuant to 29 U.S.C. 626(c). The District Court granted summary judgment for respondent on July 27, 1993. Petitioner moved for a new trial in apt time, which was denied. Petitioner then appealed to the United States Court of Appeals for the Fourth Circuit in apt time. That Court had subject matter jurisdiction pursuant to 28 U.S.C. 1291.

Statement of the Facts

Petitioner started working for respondent in 1978. Respondent is a supplier of vending machines and cafeteria services. In 1986 petitioner was purchased by, and thereafter operated as a division of, Canteen Corporation. Following this purchase Ed Williams assumed control of respondent's three sales territories in North Carolina: "4Cs North", "4Cs South", and Canteen's Greensboro/Raleigh, North Carolina area. Petitioner was manager of "4Cs North" until late 1989. That year his territory's profits were very good and he earned a bonus of $37,000, which Ed Williams told him was the highest bonus made by anyone in the company that year. His performance rating for that year, by Ed Williams, was "commendable."

At the end of 1989 several management changes were made. Petitioner volunteered to become Manager of "4Cs South" because it had had perennial financial problems and he relished the challenge of turning it around. Mike

Kiser, petitioner's subordinate at 4Cs North, took over that territory on petitioner's departure. Six months later, in June 1990, half of 4Cs South, petitioner's then territory, was added to 4Cs North and assigned to Kiser, purportedly because petitioner was "slow" in responding to problem accounts. Contemporaneous with this reassignment Ed Williams began making age-related derogatory remarks to and around petitioner. While watching a golf tournament play-off on television in late June or early July in the office, Williams commented to petitioner that petitioner was "too old" to play 18 holes of golf five days in a row. In late July in petitioner's office Williams told petitioner that petitioner was "too damn old for this kind of work." Petitioner called this statement to the attention of the Manager of Employee Relations who was seated within earshot in the next office. She immediately told Williams "that he shouldn't say things like that." In response Williams left the office. Then, in early August, in petitioner's presence but in response to another employee's comment that he would soon be 50, Williams remarked: "It's about time we started to get some young blood in this company." Two days later, pursuant to another reorganization and reduction in force, Williams assumed control of Canteen's South Carolina territory which had been managed by Ted Finnell (Finnell), and the three North Carolina territories and the South Carolina territory were consolidated into two territories under Williams. Petitioner, age 56, was terminated. The manager of Canteen's Raleigh/Greensboro territory, Alan Hunter, age 57, was demoted to a sales position. Petitioner's territory was assigned to Finnell, age 40.

Hunter's territory was assigned to Kiser, age 35. Ed Williams had been Finnell's supervisor through December, 1989. For 1989 he had given Finnell a ratir of "competent", considerably lower than the "commendable" he gave petitioner at the same time. Thereafter Williams did not supervise Finnell and there was no evidence that he had checked back to determine whether Finnell's performance had improved or deteriorated in the intervening eight month period. For several years previously petitioner had placed consistently higher within his salary class than had Finnell.

In support of his motion for new trial petitioner presented the affidavit of Philip Dennis. Dennis stated that the day after petitioner was fired he asked Ed Williams if there were any reason for firing petitioner and Williams replied that all of us were getting old, that Jim (petitioner) was getting old, and that there were three other persons around the office who were turning 50. After this meeting Williams and Dennis left Williams' office and another employee came up and asked Williams what had happened to petitioner. Williams replied that, like he had been telling Dennis, he guessed Jim was getting old and that three people around the office would be turning 50.

ARGUMENT

1. *Whether a plaintiff alleging discriminatory discharge under the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. (ADEA), may satisfy the fourth element of the McDonnell-Douglas prima facie case paradigm by showing*

that he was replaced by a younger person or that a younger person was retained in a similar position, or must show that he was replaced by someone outside the protected class.

Ten Circuit Courts have held that the replacement need not be within the protected age group, and in one other Circuit there are cases both ways.[2] The Circuit Court below lightly recognized, App. 10, n.1, that there was contrary authority to its ruling but failed to indicate the truly overwhelming weight of the contrary authority.

The requirement of an under-age-40 replacement offends the history and policy of the ADEA.[3]

The legislative history of the ADEA expressly states that there is no requirement that the beneficiary of the discrimination be under age 40. When the ADEA was introduced in the Senate Senator Javits stated:

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[2] *Freeman v. Packaging Machine Co.*, 865 F.2d 1331, 1335 n.1 (1st Cir. 1988) (age of replacement not a factor); *Haskell v. Kemen Corp.*, 743 F.2d 113, 119 n.1 (2nd Cir. 1984); *Maxfield v. Sinclair International*, 766 F.2d 788, 792-93 (3rd Cir. 1985); *Lindsay v. Prive Corp.*, 987 F.2d 324, 326-327 (5th Cir. 1993); *Roper v. Peabody*, 47 F.3d 925, 927 (7th Cir. 1995); *Rinehart v. City of Independence*, 35 F.3d 1263, 1265-66 (8th Cir. 1994); *Douglas v. Anderson*, 656 F.2d 528, 532 (9th Cir. 1981); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988); *Carter v. City of Miami*, 870 F.2d 578, 582-83 (11th Cir. 1989); *D.C. Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982); *compare, e.g., Raush v. KFC Nat'l Mgt. Co.*, 10 F.3d 392, 396 (6th Cir. 1993) (standard includes replacement by a younger person) *with LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (*prima facie* case requires replacement from outside protected class).

[3] The text of the ADEA does not address the question presented here.

> Section 4 of the Bill [29 U.S.C. 623] specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 . . . because he is younger than the man 52, then he will have violated the act . . .

113 Cong. Rec. 31,255 (1967). Senator Yarborough, the floor manager of the Bill, agreed. *Id.*

The under-age-40 requirement also makes no sense as a matter of policy. As the Third Circuit has stated, "[i]f no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40." *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir.), *cert. denied*, 474 U.S. 1057 (1986).

The under-age-40 requirement is also irrational. What is sought to be proved is age animus. It is illogical to allow it to be proved when a 40 year old is replaced by a 39 year old, but not when a 69 year old is replaced by a 40 year old. The situation here, replacement of a 56 year old by a 40 year old, is clearly suggestive of age animus.

2. *Whether the Circuit Court fundamentally altered the requirements for proof of motive in holding that petitioner failed to make out a prima facie case of age discrimination based on direct and indirect evidence because (a) the decision-maker's statement that petitioner was "too damn old for this*

kind of work" was not made in the context of replacing petitioner, and (b) other statements of age animus by the decisionmakers were not made in the context of terminating petitioner.

(a) Petitioner may make out a prima facie case that age animus motivated his discharge by direct evidence, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 83 L.Ed 2d 522, 533, 105 S. Ct. 613 (1985), or by indirect evidence, *see, e.g., Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982). The ultimate inquiry is whether Petitioner was discharged "because of age." 29 U.S.C. 623(a). "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. ___, 123 L.Ed. 2d 338, 346, 113 S.Ct. 1701 (1993).

Summary judgment is generally disfavored when motive is an issue. *See, Poller v. CBS*, 368 U.S. 464, 473, 7 L.Ed. 2d 458, 464, 82 S.Ct. 486 (1962). A wide variety of types of evidence may be used to prove discrimination, including past treatment. *See, Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88, 105 L.Ed. 2d 132, 109 S.Ct. 2363 (1989). Two weeks before petitioner's discharge, Ed Williams told him he was "too damm old for this kind of work." The Circuit Court held this direct evidence of motive to be insufficient only by adding a new and unauthorized proof requirement, that petitioner also show that the employer was considering replacing him. This requirement is fundamentally inconsistent with proof of action "because of age" because an age-motivated discharge can occur in the absence of any replacing of the discharged person.

(b) The other two age-based comments directed to petitioner by the decisionmaker were held insufficient to

prove age-based motivation because they had no sufficient "nexus" linking them to petitioner's termination, even though the golfing remark, App. 18-19, was made by the decisionmaker contemporaneously with action reducing petitioner's territory without justification, and the "young blood" remark, App. 17, was made only two days before petitioner's discharge.[4] This "nexus" requirement has been criticized within the Fourth Circuit and is in conflict with rulings in the Fourth and other Circuits. In *Tuck v. Hinkel Corp.*, 973 F.2d 371 (4th Cir. 1992), *cert. denied*, 490 U.S. 1098 (1993), the Court found that an appropriate "nexus" existed when a former supervisor stated to plaintiff that "he wanted to get rid of the older people and replace them with 'young blood' ", and that "what [the company] needed was '*younger people*' ". *Id.*, at 377 (emphasis in original). The Fourth Circuit then remarked, concerning the prior case of *EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992), the case that originated the "nexus" requirement:

> "We do not read Clay Printing's holding to prevent statements that a company wants to replace its older employees with younger ones from being considered evidence of age discrimination, for it was to keep older workers from suffering adverse employment actions based on the assumption that younger workers are more desirable by virtue of their age that Congress enacted the ADEA.

---

[4] The Circuit Court found, without any factual or record basis, that the "young blood" remark, App. 17, was "apparently humorous", *id.*, and that the "too old" remark, App. 18-19, was "inane," *id.*

Tuck v. Hinkel Corp., 973 F.2d at 277 n.5. *See also, Smith v. Great Am. Rest., Inc.*, 969 F.2d 430, 434 (7th Cir. 1992) (remark that plaintiff was fired because she was " 'too old to cut it' " in new 24-hour operations was direct evidence); *Alphin v. Sears, Roebuck & Co.*, 904 F.2d 1497, 1500-01 (11th Cir. 1991) (remark that "both [plaintiff and supervisor] had been around too long and were too old and were making to much money" was probative).[5]

Petitioner respectfully requests that this Court issue its Writ of Certiorari to review the challenged decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted, August 29, 1995.

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[5] This argument is intended to include as "subsidiary questions" within the meaning of Supreme Court Rule 14.1 these questions:

1. Whether the Circuit Court erroneously segmented petitioner's evidence into discretely considered segments and thereby failed to consider it in its totality;
2. Whether the Circuit Court erred in affirming the District Court's refusal to grant a new trial, App. 39; and
3. Whether the Circuit Court erred in crediting as fact respondent's theory that petitioner was not even a contender for continued employment, App. 12.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES O'CONNOR,

Plaintiff-Appellant,

v.

CONSOLIDATED COIN CATERERS CORPORATION,

Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

No. 94-1214

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, Senior District Judge.
(CA-91-277-C-C-P)

Argued: January 31, 1995

Decided: April 21, 1995

Amended opinion filed: June 8, 1995

Before HAMILTON and LUTTIG, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Luttig joined. Senior Judge Butzner wrote a separate opinion, concurring in part and dissenting in part.

ARGUED: George Daly, GEORGE DALY, P.A., Charlotte, North Carolina, for Appellant. Barbara L. Sloan, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. James Bernard Spears, Jr., HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Charlotte, North Carolina, for Appellee. **ON BRIEF**: Sharon Samek, GEORGE DALY, P.A., Charlotte, North Carolina, for Appellant. James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. Jacob J. Modla, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Charlotte, North Carolina, for Appellee.

OPINION

HAMILTON, Circuit Judge:

James O'Connor (O'Connor) brought a claim against Consolidated Coin Caterers Corporation (Consolidated) pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1994), contending that Consolidated terminated him because of his age. The district court granted summary judgment in favor of Consolidated, holding that O'Connor could not succeed on his claim of age discrimination. We affirm.

I.

Consolidated operates cafeterias and vending machines primarily for use in industrial plants, businesses, schools and health care facilities. Although separately incorporated, Consolidated operates as a division

of its parent company, Canteen Corporation (Canteen). In 1986, O'Connor was the general manager of Consolidated's northern region known as 4Cs North, which was centered in Raleigh, North Carolina, and served northern North Carolina and southern Virginia; Edward Williams (Williams) was O'Connor's direct supervisor, and Williams reported to Ted Arts (Arts), President of Canteen's Central Division.

In 1989, Canteen restructured its operations so as to have three geographic territories instead of four. As a result of this reorganization, O'Connor became the general manager of 4Cs South, which was based in Charlotte, North Carolina, and served southern and western North Carolina, as well as northern South Carolina, and Mike Kiser (Kiser) of Consolidated took over O'Connor's job as general manager of 4Cs North. Allen Hunter (Hunter) and Ted Finnell (Finnell), employees of Canteen, remained respectively the managers of Canteen's Greensboro/Raleigh and Greenville/Spartanburg operations.

On July 10, 1990, Williams reassigned three geographic territories from O'Connor to Kiser, resulting in the following management scheme:

Kiser 4Cs North Manager	Hunter Canteen Manager	O'Connor 4Cs South Manager
Burlington	Raleigh	Charlotte
Smithfield	Greensboro	Laurinburg
Tarboro		Shelby
Hickory		
Asheville		
Albemarle		
South Boston		

According to Consolidated, Williams reassigned the territories from O'Connor to Kiser because O'Connor was slow in responding to problem accounts. When this decision was made, Williams did not know that Arts was planning another reorganization to consolidate Canteen and Consolidated's operations.

Sometime subsequent to July 10, 1990, Arts contacted Williams, informing him that he wanted to reorganize Canteen and Consolidated's operations in North and South Carolina to reduce operating costs under the following terms: combine Consolidated with Canteen's North and South Carolina's operations into a single, larger geographic territory, have this new territory managed by Williams, and have Williams combine the management responsibilities of Finnell, Kiser, Hunter, and O'Connor. Subsequently, Williams decided to divide this new territory into two newly-organized districts: the Northern District serving northern North Carolina and southern Virginia, and the Southern District serving southern North Carolina and all of South Carolina. These two new districts were substantially larger in geographic territory than under the previous organizations. In August of 1990, this new "Carolinas Region" was organized as follows:

CAROLINAS REGION

Finnell Southern District	Kiser Northern District
Charlotte	Burlington
Shelby	Smithfield
Laurinburg	Tarboro
Greenville	Raleigh
Spartanburg	Greensboro
Columbia	South Boston
Hickory	
Asheville	
Albemarle	

As a consequence of this reorganization, on August 10, 1990, O'Connor, age fifty-six, was discharged, and Hunter, age fifty-seven, was demoted.

Having created two new, large districts, Williams chose Finnell, age forty, to manage the Southern District, and Kiser, age thirty-five, to manage the Northern District. According to Consolidated, crucial to selecting the managers for the new districts was the fact that there were substantially greater management responsibilities than had been required under the previous organizations and the new districts were substantially larger in geographic area. Williams asserted he selected Finnell and Kiser because he was Finnell's former direct superior, had firsthand knowledge of both men's work and abilities, and considered them competent to handle the greater responsibilities and larger geographic territory.

According to Consolidated, it did not select O'Connor to manage one of the two new districts because they served a greater number of customers, entailed more

accounts, covered a substantially larger geographic territory, and O'Connor was slow in responding to problem accounts. Consolidated asserted that a critical factor in not selecting O'Connor was the fact that even before the second reorganization, Williams had reduced the size of O'Connor's territory from six territories to three. Given that O'Connor was slow with his already-reduced territory, Consolidated concluded that he could not handle an even larger region. Also, Consolidated asserted that O'Connor had not timely responded to a problem involving food delivery in unrefrigerated trucks.

Discrediting Consolidated's reasons for terminating him, O'Connor asserted that he was discharged because of his age; consequently, he brought suit under the ADEA. The district court granted summary judgment in favor of Consolidated. Although observing that this case was not the typical reduction-in-force case characterized by mass layoffs, because here the reduction consisted of only O'Connor and Hunter and O'Connor was essentially replaced by Finnell, the district court nevertheless applied the modified *McDonnell Douglas* four-prong test used in reduction-in-force suits and concluded that O'Connor failed to establish a *prima facie* case because O'Connor failed to present any evidence that Consolidated did not treat age neutrally in deciding to terminate him. Next, the district court held that O'Connor failed to establish his case by the ordinary burden of establishing by direct and/or circumstantial evidence that he was terminated because of his age.

Subsequently, O'Connor moved for a new trial, ostensibly on the basis of newly-discovered evidence. *See* Fed.R.Civ.P. 59(a). O'Connor's proffered evidence was an

affidavit of a former coworker, Phillip Dennis (Dennis). Because there had been no trial, but a grant of summary judgment, the district court construed O'Connor's motion as one for relief from judgment based on newly-discovered evidence and denied it. *See* Fed.R.Civ.P.60(b)(2). This appeal followed.

II.

Rule 56(c) requires that the district court enter judgment against a party who, "after adequate time for . . . discovery fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To prevail on a motion for summary judgment, Consolidated must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) it is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact has been raised, we must construe all inferences in favor of O'Connor. *See id.* 257-58. If, however, "the evidence is so one-sided that one party must prevail as a matter of law," we must affirm the grant of summary judgment in that party's favor. *Id.* at 251-52. O'Connor "cannot create a genuine issue of fact through mere speculation or the building of one inference upon another." *See Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). To survive Consolidated's motion, O'Connor may not rest on his pleadings, but must demonstrate that specific, material facts exist that give rise to a genuine issue. *See Celotex Corp.*, 477 U.S. at 324. As the Anderson Court explained, the "mere existence of a scintilla of

evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 244. Our review of a grant of summary judgment is plenary. *See Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1260 (4th Cir. 1993).

Contending that his employment was terminated because of his age, O'Connor brought this suit against Consolidated pursuant to the ADEA. In order to establish his claim, O'Connor may rely on the normal methods of succeeding on a civil suit by establishing by a preponderance of the evidence that but for Consolidated's motive to discriminate against him because of his age, he would not have been discharged. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982). O'Connor "may meet this burden under the ordinary standards of proof by direct or indirect evidence relevant to and sufficiently probative of the issue." *EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992). Alternatively, O'Connor may resort to the proof scheme articulated for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which we have applied to ADEA claims, *see Mitchell v. Data General Corp.*, 12 F.3d 1310, 1314-15 (4th Cir. 1993); *EEOC v. Western Elec. Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). To establish a *prima facie* case on an ADEA claim under the *McDonnell Douglas* rubric, O'Connor must prove the following elements:

> (1) [he] is in the protected age group; (2) [he] was discharged or demoted; (3) at the time of discharge or demotion, [he] was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, [he] was replaced by someone of comparable qualifications outside the protected class.

Id.

A.

Although the parties and the district court characterized the present appeal as a reduction-in-force case, the reduced "force" consisted of only two people, O'Connor and Hunter, and while O'Connor's position was eliminated, he was essentially replaced by Finnell. Thus, the complexities and difficulties of determining what employee was replaced by whom in the typical mass layoff case is simply not an issue here. *See Clay Printing Co.*, 955 F.2d at 937 (twenty-three employees laid off); *Western Elec. Co.*, 713 F.2d at 1013 (reduction-in-force test applied to work force of 225 employees). Also, unlike the typical reduction-in-force case, O'Connor can point to his replacement. *See Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1418 (4th Cir.) (explaining that in reduction-in-force suits determining the employee that replaced the plaintiff may prove difficult, often because jobs have been eliminated or combined), *cert. denied*, 502 U.S. 963 (1991). We are not persuaded, therefore, that this case is properly characterized as a reduction-in-force suit. Thus, application of the reduction-in-force paradigm is inapt here. Applying the *McDonnell Douglas* paradigm, we conclude that O'Connor cannot establish a *prima facie* case because he fails to satisfy the fourth element, *i.e.*, he was not replaced

by someone outside the protected class.[1] Here, Finnell was forty years old, and thus he was within the protected class. *See* 29 U.S.C.A. § 631(a) (West Supp.1994). Having failed to satisfy an element of his claim, O'Connor cannot prevail. The district court, therefore, properly entered summary judgment in favor of Consolidated.

B.

We conclude that even applying the reduction-in-force test to this suit, O'Connor cannot prevail on his claim. In the typical reduction-in-force case, we apply a

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[1] While some circuits hold that an ADEA plaintiff can satisfy the fourth element of *McDonnell Douglas* by showing that he was replaced by someone younger or that younger coworkers were retained in the same or similar positions, even if, as here, the replacements were in the protected age group, *see, e.g., Roper v. Peabody Coal Co.*, No. 94-2694, at * 1 (7th Cir. Feb. 17, 1995); *Douglas v. Anderson*, 656 F.2d 528, 532 (9th Cir. 1981), Fourth Circuit precedent has required a plaintiff to demonstrate that his replacement was outside the protected class to satisfy that element, *see, e.g., Clay Printing Co.*, 955 F.2d at 943 (explaining that because the replacements in a reduction-in-force suit were within the protected class, the plaintiffs had to demonstrate that the employer did not treat age neutrally in making its employment decisions); *Western Elec. Co.*, 713 F.2d at 1014 (holding that "in the usual ADEA case," a plaintiff must prove that he "was replaced by someone of comparable qualifications outside the protected class"); *cf. Lovelace*, 861 F.2d at 238-39 & n. 5 & 242-43 n. 13 (noting in dicta that it did not rely on the fact that the plaintiff was replaced by someone in the protected class in reaching its decision and noting further that "[w]hether the absolute and relative ages of [plaintiff] and replacement may be factually relevant to the discrimination issue [was] . . . a different matter").

modified version of the *McDonnell Douglas prima facie* standard:

> (1) the employee was protected by the ADEA; (2) he was selected for discharge from a larger group of candidates; (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force of persons in the groups containing some unprotected persons who were performing at a level lower than that at which he was performing.

Mitchell, 12 F.3d at 1315. This fourth element is usually characterized by stating that a plaintiff must produce "some other evidence that the employer did not treat age neutrally." *Western Elec. Co.*, 713 F.2d at 1015. We have made this modification in such cases because the plaintiff's position may have been eliminated or it may be difficult for the plaintiff to show precisely who replaced him. *See id.* at 1014. While we have noted that "the fourth element [of the *McDonnell Douglas* scheme] will not fit well in most reduction-in-force cases," we have concluded that an ADEA plaintiff "should not be permitted to establish a 'prima facie case' by satisfying only the first three elements." *Id.*

Indisputably, O'Connor satisfies elements one and two, *i.e.*, he is in the protected class and was discharged. The third element requires that O'Connor perform at a level substantially equivalent to the lowest level of those of the group retained. Essentially, this element demands that O'Connor perform his job satisfactorily, thereby

meeting Consolidated's legitimate expectations. According to Consolidated, O'Connor cannot satisfy this element because even prior to the reorganization that gave rise to the two new district manager positions, O'Connor was slow in dealing with problem accounts, his territorial responsibilities had already been greatly reduced, and he experienced a problem with food delivery in an unrefrigerated truck. Thus, Consolidated posits, O'Connor fails the third prong.

Conversely, O'Connor contends that his performance was satisfactory and that his evidence tended to establish that Consolidated did not treat age neutrally in discharging him. To support these contentions, he relies on: (1) a good performance review dated January 1990 that reviewed the latter part of 1989 along with a large bonus he received in 1989 for good work and comparative salary data; (2) Finnell and Kiser, the younger men, one of whom was outside the protected class, were retained while he and Hunter, the older men, were respectively discharged and demoted; and (3) testimony of Williams that O'Connor had made progress with individual accounts and 4Cs South made some improvement, despite the fact that 4Cs South generally had a lower profit margin than 4Cs North.

This evidence, however, does not tend to establish that O'Connor was a satisfactory employee because Williams did not consider these facts in his decision to discharge O'Connor; rather, Consolidated had already substantially reduced O'Connor's geographic territory, and given this fact, he was not a contender for one of the new positions. The 1990 review of 1989, 1989 bonus, salary data, and some improvement in 4Cs South are

irrelevant because O'Connor was not performing well in August of 1990, the time of termination. *See Anderson v. Stauffer Chem. Co.*, 965 F.2d 397, 401 (7th Cir. 1992) (stating that a 1984 evaluation, even if given in December of 1984, and a pay raise given at the start of 1985 was not relative to a discharge on May 1, 1985). Moreover, at the time Consolidated decided to terminate O'Connor, Williams did not know of Art's decision to consolidate Canteen's and Consolidated's organizations. With respect to the evidence that O'Connor was improving, even if O'Connor were making some progress with respect to some accounts, that does not negate the fact that he did not react timely to other problem accounts or that 4Cs South's performance was still not up to par. Because under Art's reorganization the geographic territories were even larger, and O'Connor's territory was already reduced, O'Connor's evidence tending to establish that he was working up to expectations does not create a genuine issue of material fact.

The fourth prong of the reduction-in-force test requires that O'Connor show "that persons outside the protected class were retained in the same position *or* that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss the plaintiff." *Herold v. Hajoca Corp.*, 864 F.2d 317, 320 (4th Cir.), *cert. denied*, 490 U.S 1107 (1988). We conclude that O'Connor failed to demonstrate Consolidated did not treat age neutrally in discharging him.[2] Focusing on retaining Finnell and Kiser, O'Connor is not comparable to Kiser or Finnell since his territory was reduced

[2] *See* n. 1.

prior to his termination due to his slow response to problem accounts. Because O'Connor is not comparable to these men, comparing performance reviews and salaries is inapt. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 533 (10th Cir. 1994) (opining that in an age discrimination case, the plaintiff must be comparable to her replacement). In deciding to keep Finnell and Kiser and discharge O'Connor, Williams' decision was based on Finnell and Kiser's ability to handle an enlarged geographic territory; three territories were reassigned to Kiser because O'Connor was slow in responding to problem accounts; the fact that these men could handle the larger territories was critical to the decision to discharge O'Connor. Also, there is nothing in the record disclosing Hunter's ability or performance during the relevant time. Therefore, no comparison can be made between Hunter and Finnell or Kiser. In fact, a month before O'Connor was discharged, Williams considered Kiser's ability to manage a larger geographic territory superior to that of O'Connor. The decision to discharge O'Connor, therefore, was not grounded in invidious discrimination, but rather on the age-neutral reason that O'Connor's performance did not recommend him for the job, while Finnell and Kiser's did. O'Connor's evidence does not create a genuine issue of material fact that Consolidated did not treat age neutrally in making its employment decisions. Additionally, the case law reveals examining a small pool of employees is not probative of discrimination. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir.) (comparing four individuals is too small a sample to be probative of discrimination in a ADEA suit), *cert. denied*, 115 S.Ct. 666 (1994); *Simpson v. Midland-Ross Corp.*, 823 F.2d

937, 943 & n. 7 (6th Cir. 1987) (stating that sample of seventeen in an age discrimination case was suspect) (collecting cases); *see also Iturbe v. Wandel & Golterman Technologies, Inc.*, 23 F.3d 401 (4th Cir. 1994) (unpublished) (*per curiam*) (stating that a "court cannot properly draw an inference of discrimination from a pool of only three employees"). Under these precedents, no inference of discrimination may be drawn in this suit. We find that O'Connor failed to satisfy the fourth prong.

III.

As stated, an ADEA plaintiff can establish his claim under the proof scheme articulated in *McDonnell Douglas* or under the ordinary standards of proof used in civil cases. Here, O'Connor appeared to proceed under both proof schemes. Having concluded that O'Connor cannot prevail under the *McDonnell Douglas* paradigm, we analyze his claim under the standards of proof by direct and circumstantial evidence used in civil cases.

To succeed on his ADEA claim under the direct standard of proof scheme, O'Connor must establish the following elements: "(1) that he . . . was an employee covered by the [ADEA], (2) who suffered an unfavorable action by an employer covered by the [ADEA], and (3) that age was a determining factor in the action in the sense that but for [Consolidated's] intent to discriminate on the basis of age, [O'Connor] would not have been subjected to the employment action." *Clay Printing Co.*, 955 F.2d at 941 (internal quotation marks omitted). To defeat a motion for summary judgment under this scheme, O'Connor must " 'produce direct evidence of a

stated purpose to discriminate [on the basis of age] and/or circumstantial evidence of a stated purpose to discriminate [on the basis of age] of sufficient probative force to reflect a genuine issue of material fact.' " *Id.* (quoting *Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988)) (alteration in original). "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact . . . without any inference or presumptions." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993). The same summary judgment standard applies under this proof scheme.

A.

The direct evidence on which O'Connor relies to establish his case are three statements about age-related matters made by Williams. While derogatory remarks may be direct evidence of age discrimination, *see Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), the decisional law "clearly reflects that isolated and ambiguous statements . . . 'are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination,' " *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (quoting *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 268 n. 2 (6th Cir.), *cert. denied*, 480 U.S. 919 (1987)). Discriminatory remarks concerning age, therefore, cannot be stray or isolated statements. According to the Seventh Circuit, "[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge." *McCarthy v. Kempter Life Ins. Co.*, 924 F.2d 683, 686-87 (7th Cir. 1991). As this court has opined, there must be some

"nexus . . . between the alleged discriminatory statements and *any* of the employment decisions made by the [employer]." *Clay Printing Co.*, 955 F.2d at 942; *see also Figures v. Board of Pub. Utils.*, 967 F.2d 357, 360-61 (10th Cir. 1992) (noting that racial comments are not probative of discrimination unless they are linked to the challenged action); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (holding that certain statements unconnected to the employment decision-making process are simply stray remarks that do not demonstrate discriminatory intent). With these principles in mind, we consider the challenged statements.

1.

The first statement was made two days before O'Connor's discharge. Williams remarked that "[i]t's about time we get some young blood in this company." (J.A. 122). This comment was made in response to a comment by Don Dillingham, another Consolidated employee, that his fiftieth birthday was fast approaching. This apparently humorous comment is not probative of age discrimination. First, as the *Birkbeck* court explained, comments such as this are innocuous and create no inference of age bias. The *Birkbeck* court ruled that the statement " 'there comes a time when we have to make way for younger people,' " simply lacks discriminatory intent and is more accurately understood as a commentary on the fact that all people age. *Birkbeck*, 30 F.3d at 511-12; *see also Clay Printing Co.*, 955 F.2d at 942 (holding that an employer's comment that the employer needed to " 'attract newer, younger people' " and needed " 'young

blood' " failed to establish direct evidence of age discrimination); *Gagne,* 881 F.2d at 314 (holding that the employer's comment that he " 'needed younger blood' " did not raise a material fact with respect to establishing age discrimination). Second, there is no nexus linking this statement to O'Connor's termination as required by *Clay Printing Co. See Cone,* 14 F.3d at 531 (ruling that "[i]solated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions"). Additionally, this comment does not evince an intent to discharge an older employee, but merely to attract some young ones. *See Clay Printing Co.,* 955 F.2d 942.

2.

The second statement, made two weeks prior to O'Connor's discharge, consisted of the following: " 'O'Connor, you are too damn old for this kind of work.' " (J.A. 125). O'Connor testified, however, that he did not remember what he and Williams were discussing when this comment was made or whether this comment was in relation to a business matter. (J.A. 124-25). Thus, there is no evidence that this statement was made in the context of replacing O'Connor. Without this requisite nexus, this statement evinces no discriminatory intent. *See id.*

3.

The third statement, uttered in either June or July of 1990, was made in connection with O'Connor's ability to play golf. That statement was made under the following circumstances: O'Connor, Williams, and Steve Carpman,

another Consolidated employee, were watching a golf match on television. *O'Connor* stated that he "couldn't walk that many rounds of golf for five days to play 18 holes for five days." (J.A. 127). Williams responded to this comment by stating that O'Connor was just "too old." Again this inane statement was in reply to O'Connor's jocular declaration that he was too old to play eighteen holes of golf. Here again, there is nothing linking this remark with O'Connor's discharge. We agree with the district court that these remarks are simply stray comments that do not establish evidence of age discrimination.

B.

We explained the infirmities with respect to O'Connor's indirect evidence in section IIB. The same reasoning obtains here. The district court dismissed this evidence as insufficiently probative to establish O'Connor's claim, and we agree with this conclusion.

IV.

O'Connor raises two other issues, but they merit scant attention. First, he asserts that the district court erred in refusing him certain discovery requests. Reversal of discovery rulings is proper "only on a clear showing of abuse, and 'it is unusual to find abuse of discretion in these matters.' " United Presbyterian Church in the *United States v. Reagan,* 738 F.2d 1375, 1382 (D.C.1984) (quoting *Swanner v. United States,* 406 F.2d 716, 719 (5th Cir. 1969)). We have carefully examined the discovery issues and conclude that the district court did not err

with respect to these rulings. Second, O'Connor contends that the district court erred in denying his Rule 59 motion, which the district court construed as a Rule 60(b)(2) motion, based on Dennis' affidavit. We have examined this affidavit, and we agree with the district court that this evidence fails to satisfy the criteria for granting relief under either Rule 59 or Rule 60. *See Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

V.

We conclude that regardless of how O'Connor's claim of age discrimination is viewed, he failed to raise a genuine issue of material fact precluding summary judgment. We therefore affirm the district court's grant of summary judgment in favor of Consolidated. We have examined carefully O'Connor's discovery request and his Rule 59 motion and conclude that they are without merit; thus, we affirm those rulings as well. The judgment of the district court is, in all respects, affirmed.

AFFIRMED.

BUTZNER, Senior Circuit Judge, concurring in part and dissenting in part:

I

I reluctantly concur in the court's conclusion that O'Connor cannot make out a *prima facie* case of discrimination under the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because he was not replaced by someone outside the protected class.

This circuit's version of the *McDonnell Douglas* formula requires an ADEA plaintiff to demonstrate that he was replaced by someone outside the protected age group. *See, e.g., EEOC v. Clay Printing Co.*, 955 F.2d 936, 943 (4th Cir. 1992); *EEOC v. Western Elec. Co.*, 713 F.2d 1011, 1015 (4th Cir. 1983). These cases compel my concurrence.

Such an absolute requirement, however, has no justification in law or policy. The Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., states that its objective is "to prohibit arbitrary age discrimination." 29 U.S.C. § 621(b). The Act contains no language permitting employers to favor a younger employee over an older one on the basis of age simply because the younger employee is within the protected age group.

As a method of proof, the *McDonnell Douglas* paradigm was "not intended to be rigid, mechanistic or ritualistic." *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978). The age of a replacement employee should be a relevant, but not dispositive, factor for a court to consider when deciding whether the plaintiff has established a *prima facie* case under the *McDonnell Douglas* framework.

Most other circuits take this approach and observe that a plaintiff need only show he was replaced by someone younger, whether outside or within the protected age group. *See Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1335 n. 2 (1st Cir. 1988); *Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792-93 (3d Cir. 1985); *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 153-56 (7th Cir. 1994);

Rinehart v. City of Independence, 35 F.3d 1263, 1265-66 (8th Cir. 1994); *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988); *Carter v. City of Miami*, 870 F.2d 578, 582-83 (11th Cir. 1989); *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C.Cir. 1982); *see also Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 237 n. 5 (4th Cir. 1982) (dictum). *But see LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (requiring plaintiff to show that replacement was outside protected age group).

II

I respectfully dissent from the court's conclusion that, under ordinary standards of proof, O'Connor failed to raise an inference of discrimination. An ADEA plaintiff may prevail on a discrimination claim by demonstrating, through direct or circumstantial evidence, that but for an employer's motive to discriminate on the basis of age the plaintiff would not have been discharged. *Clay Printing*, 955 F.2d at 940; *Lovelace*, 681 F.2d at 239.

O'Connor has presented sufficient evidence of discriminatory motive to survive summary judgment. He testified in his deposition that Ed Williams, his supervisor, told him two weeks before his discharge, "O'Connor, you're too damn old for this kind of work." Williams denied making this statement.

Additionally, in his postjudgment motion, O'Connor provided the court with the affidavit of Phillip Dennis, who was a coworker of O'Connor. In his affidavit Dennis states that Williams told him Ted Arts, Williams's boss, had ordered Williams to fire O'Connor. When Dennis

asked why O'Connor was fired, Williams responded "that all of us were getting old, that Jim [O'Connor] was getting old." Because this affidavit was not reasonably available earlier, I believe the district court should not have rejected it.

These statements create a genuine issue of material fact that should be decided at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A jury could reasonably infer from Williams's statement or from the information contained in the Dennis affidavit that age was the determining factor in O'Connor's discharge. Because a trier of fact should determine O'Connor's claim, I would vacate the judgment of the district court and remand for a full evidentiary hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-91-227-P

JAMES O'CONNOR,
Plaintiff,
v.
CONSOLIDATED COIN CATERERS CORPORATION,
Defendant.

MEMORANDUM OF DECISION AND ORDER

(Filed July 27, 1993)

THIS MATTER is before the Court on motion, filed June 16, 1993, of Consolidated Coin Caterers Corporation ("Consolidated") for summary judgment. Plaintiff James O'Connor filed a response and an affidavit on July 6, 1993, and July 9, 1993. Consolidated followed with a reply on June 19, 1993.

O'Connor's complaint alleges a violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Specifically, O'Connor alleges that although Consolidated told him that his position was eliminated as part of a reduction in force, Consolidated actually filled his position with a younger man. Now, after the conclusion of discovery, Consolidated has moved for summary judgment.

Summary Judgment Standard

Summary judgment is appropriate when the pleadings, responses to discovery, and the record reveal that no

genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing that no genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met its burden, the non-moving party must come forward with specific facts showing that evidence exists to support its claims and that a genuine issue for trial exists. *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see* Fed. R. Civ. P. 56(e) (in response to motion for summary judgment, "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). When considering motions for summary judgment, courts must view facts and inferences in the light most favorable to the party opposing the motion for summary judgment. *Matsushita*, 475 U.S. at 587-88; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). When, however, the evidence from the entire record could not lead a rational fact-finder to find for the non-moving party, no genuine issue for trial exists and summary judgment is appropriate. *Matsushita*, 475 U.S. at 587.

Factual Background

O'Connor began his employment with Consolidated in 1978. Consolidated principally operates cafeterias and

vending machines in industrial plants. O'Connor managed a territory for Consolidated while he was in its employ. In December of 1989, O'Connor became the district manager for the region known in the company as "4Cs South." Four Cs South, centered in Charlotte, encompassed much of southern and western North Carolina until July of 1990 when Ed Williams, O'Connor's immediate supervisor, reallocated some of O'Connor's territory to another manager. On August 9, 1990, Consolidated terminated O'Connor and demoted one other manager as part of a reorganization or reduction-in-force.

Prior to O'Connor's termination, Consolidated and its parent company, Canteen Corporation (collectively "Consolidated/Canteen"), operated three districts in North Carolina and one district in South Carolina. After the reorganization and the consequent reduction-in-force of managers in August of 1990, Consolidated and Canteen operated only two districts in North Carolina and South Carolina collectively. As noted above, O'Connor was terminated and another manager, Allen Hunter, demoted to achieve the reduction in force. Both O'Connor and Hunter were over 50 at the time. Consolidated/Canteen retained Ed Finnell, age 40 at the time, and Mike Kiser, age 35 at the time. O'Connor's old district was combined into the new Four Cs South which was placed under the supervision of Finnell. The new Four Cs South also included Finnell's old district, Canteen's operations in Columbia, Spartanburg, and Greenville, South Carolina.

Discussion

To prove a case of age discrimination, the plaintiff must demonstrate that: he was an employee covered by the Act at the time of the unfavorable employment decision, *i.e.*, that he was over forty years of age; he suffered an unfavorable employment action at the hands of an employer covered by the Act, *e.g.*, discharge; and, the unfavorable employment action occurred "under circumstances in which the employee's 'age was a determining factor' in the action in the sense that " 'but for' his employer's motive to discriminate against him because of his age, he would not [have suffered the action]." *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238 (4th Cir. 1982) (citation omitted).

The plaintiff may prove these substantive elements in either of two ways. First, the plaintiff may rely on ordinary principles of proof just as in any case. In other words, the plaintiff could rely on any direct or indirect evidence admissible under the rules of evidence to prove his case by a preponderance of the evidence. If the plaintiff were not able to carry his burden of proof, the defendant-employer would be entitled to judgment as a matter of law and the case would not go to the jury. *Id.* at 239 Second, the plaintiff may rely on the scheme of proof initially applied to Title VII "disparate treatment" cases and known as the *McDonnell-Douglas* proof scheme. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1980). This scheme of proof favors the plaintiff initially by allowing him to rather easily establish a presumption of discrimination that, once established, compels the

defendant-employer to demonstrate a legitimate, non-discriminatory reason for the unfavorable employment decision.

The *prima facie* case of age discrimination under the *McDonnell-Douglas* proof scheme requires that the plaintiff prove four objective elements, to-wit: (1) he was in the protected age group class under the Act at the time of the unfavorable employment decision; (2) he was discharged; (3) at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations; and (4) following the discharge, he was replaced by someone of comparable or lesser qualifications outside the protected class. *Equal Employment Opportunity Comm. v. Western Elec. Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). The Court must grant summary judgment if the plaintiff does no present evidence of each of these four elements; "the claimant should not be permitted to establish a 'prima facie case' by satisfying only the first three elements." *Id.* at 1014-1015.

Although the Fourth Circuit has recognized that the fourth element, as stated, is not rigidly applicable to reduction-in-force cases, *id.* at 1014, it has not foreclosed the application of the fourth element to such cases. In fact, the Court has stated that even in reduction in force cases, the employee must demonstrate that the employer "did not treat age neutrally in its [employment decisions]." *Id.* at 1015; *Equal Employment Opportunity Comm.*, 955 F.2d 936, 943 (4th Cir. 1992) (*citing Western Electric*, 713 F.2d at 1014-1015). *Western Electric* was a large scale reduction in force in which 225 employees were adversely affected. *Id.* at 1013. The instant reduction is not nearly so

large or complex; only two employees, O'Connor and Hunter, were adversely affected.

The fourth element of the *McDonnell-Douglas* proof scheme does not normally "fit" well in reduction-in-force cases because the adversely affected employee cannot point to a replacement with whom the discharged employee would logically compare himself. *Id.* at 1014. In this case, however, there is no such problem. As noted above, the reorganization combined O'Connor's old district, Four C south, with the South Carolina district. Finnell was the manager of the old South Carolina district. The most obvious choices to supervise the new, enlarged district would have been Finnell or O'Connor. Because Consolidated/Canteen chose Finnell to head the new district and take over O'Connor's responsibilities, Finnell essentially replaced O'Connor. Indeed, O'Connor testifies in his affidavit that Consolidated/Canteen replaced him with Finnell. Affidavit of Plaintiff (filed July 9, 1993) at ¶ 9.

In the instant case, therefore, O'Connor has not produced evidence of the fourth element of age discrimination under the *McDonnell-Douglas* proof scheme. The fourth element requires that the employee-plaintiff show that the employer has replaced the plaintiff with a person outside the protected class.[1] Alternatively, the employee-

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[1] The Court is fully aware of cases in other circuits that in which the various circuits decline to apply this rule and merely require the age-discrimination plaintiff to demonstrate that he was replaced by a younger person even if the younger person is also in the protected class. *See Carter v. City of Miami*, 870 F.2d 578, 583 n.14 (11th Cir. 1989) (compiling cases). The Court declines to follow these nonbinding precedents.

plaintiff may present other objective evidence that the employer has not treated age neutrally. The protected class consists of all employees age 40 and over at the time of the unfavorable action. 29 U.S.C.A. § 631 (West 1985 & Supp. 1993). At the time of the unfavorable action, August 9, 1990, Finnell was 40 years old.[2] Because Finnell was within the protected class and O'Connor has presented no other evidence of that Consolidated/Canteen did not treat age neutrally in deciding to terminate him, the Court finds that O'Connor cannot rely on the *McDonnell-Douglas* proof scheme.

O'Connor, however, may prove his case – and defeat this motion for summary judgment – using traditional principles of proof. 713 F.2d at 1014. The principle issue in dispute here is motivation. O'Connor proffers both direct and indirect evidence in his effort to demonstrate discriminatory intent. The direct evidence consists of three remarks that Ed Williams, the decisionmaker for Consolidated/Canteen, made. First, O'Connor testified that Williams remarked – two days prior to O'Connor's termination – "It's about time we started to get some young blood in this company." O'Connor deposition at 44. Williams made this comment in response to the statement of Don Dillingham, another employee, that he was about to turn 50.

Second, O'Connor testified that Williams remarked – within two weeks of O'Connor's termination – "O'Connor, you're two [sic] damn old." O'Connor dep. at 46.

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[2] Finnell turned 41 on August 27, 1990, three weeks after O'Connor's termination.

O'Connor also testified that Williams remarked – during the same conversation – "O'Connor, you're too damn old for this kind of work." O'Connor, however, also testified that he did not remember anything else about the conversation, including the context of the remarks, the general subject of the conversation, or the length of the conversation. O'Connor dep. at 46-47.

Third, O'Connor testified that Williams stated – sometime during June or July of 1990 – that O'Connor was too old to play eighteen holes of golf for five consecutive days. O'Connor, Williams and another employee were watching a playoff of a golf tournament. While watching the tournament, O'Connor remarked that he "couldn't walk that many rounds of golf for five days to play 18 holes for five days." To this comment, Williams responded that O'Connor was "too old." O'Connor dep. at 49.

O'Connor has not presented any evidence that links these three remarks to the decision to discharge him. Stray comments cannot prove age discrimination. In order for O'Connor to rely on these comments to prove age discrimination, he must demonstrate that they were related to the decision to discharge him. *Equal Employment Opportunity Comm. v. Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir. 1992). An age discrimination plaintiff must demonstrate that a nexus exists between allegedly discriminatory statements and the unfavorable employment decision at issue. *Id.*

In the instant case, O'Connor has not demonstrated any nexus between Williams' three comments and the decision to discharge him. The first comment, "It's about

time to get some young blood in this company," was made in response to an employee's own comment on his age. This comment did not indicate an intent to discharge older employees. In *Clay Printing*, the decisionmaker had made comments such as, "too many people have been around here too long and make too much money," and "if employees had been there 10 years or more, they needed to move on," along with references to the company's need to "attract newer, younger people" and "young blood," were not probative of age discrimination or a discriminatory purpose. *Id.* at 942. The Court found that these comments reflect the need of all companies to hire young employees constantly in order to remain vital. The Court noted Chief Judge Haynsworth's comment on this need and the failure of these type comments to show age discrimination:

> In any enterprise, today's juniors will be tomorrow's seniors. Today's seniors can help create a foundation for tomorrow's growth and prosperity, but future realization of the potential of an enterprise lies principally with those who will be in positions of leadership and responsibility in the future.

Id. (*quoting Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980)). Likewise, the Court finds that Williams' comment on the need for young blood in the company is not probative of a discriminatory intent.

Williams' second comment, "O'Connor, you're too damn old for this kind of work," also is not probative of discriminatory intent. The context of the statement must

indicate discriminatory intent. O'Connor, however, testified that he did not remember the context or the subject matter of the comment. As such, plaintiff has not established a nexus between this comment and the decision to discharge him.

Williams made the third comment, that O'Connor was "too old," in response to O'Connor's admission that he could not walk eighteen holes of golf on five consecutive days. Because O'Connor was not a golfer, but rather a general manager in a catering and vending business, Williams' comment has no probative value. Clearly, Williams' comment did not have any nexus to the decision to terminate O'Connor.

O'Conner [sic] has also proffered indirect evidence of discriminatory intent. O'Conner [sic] argues that he has "substantial indirect evidence tending to show that he was performing well, and that he was better qualified to continue employment than was Ted Finnell. . . . " O'Connor's "substantial evidence," however, consists only of his comparison with Ted Finnell. Most of the indirect evidence that Plaintiff proffers is nothing more than a historical narrative of Plaintiff's employment with Consolidated. The last paragraph of the "Concluding Portion of Memorandum in Response to Motion for Summary Judgment" contains the only possibly probative evidence:

> Plaintiff had a better track record than did Finnell. At the time of plaintiff's termination, his next previous performance evaluation was "commenable [sic] minus," whereas Finnell's was "competent minus." Plaintiff placed consistently higher in his salary class than did Finnell within his salary class.

The first statement is merely a conclusion, not evidence. The second statement, although true, is not probative of

the performance of each person at the time of the termination. The evaluations of Finnell and O'Connor were made eight to nine months before the decision to terminate O'Connor. This type of evidence – historical evidence of job performance removed in time from the date of the unfavorable decision – is not probative of discriminatory intent. O'Conner [sic] has presented no evidence to support the conclusion that he was fulfilling the legitimate expectations of his employer *at the time of the discharge* (or at least performing on the same level as Finnell). Plaintiff simply has presented no specific evidence of the level of his performance relative to Finnell's performance at the time of discharge. As such, O'Conner [sic] has not carried his burden of proof. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986) (plaintiff, in response to adequately-supported motion for summary judgment, has burden of producing evidence that would support jury verdict).

Because O'Conner [sic] cannot present the objective evidence necessary to rely on the *McDonnell-Douglas* scheme of proof and cannot present direct or indirect evidence necessary to prevail under traditional principles of proof, the Court must grant summary judgment for Defendant.

NOW, THEREFORE, IT IS ORDERED that Consolidated's motion for summary judgment will be GRANTED. The Court will file simultaneously with this

memorandum of decision a judgment dismissing the plaintiff's action with prejudice.

This the 27th day of July, 1993.

/s/ Robert D. Potter
ROBERT D. POTTER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 31, 1995

No. 94-1214
CA-91-277-C-C-P

JAMES O'CONNOR

Plaintiff-Appellant

v.

CONSOLIDATED COIN
CATERERS CORPORATION

Defendant-Appellee

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Amicus Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. The EEOC filed a motion for leave to file a brief for amicus curiae in support of the suggestion for rehearing.

Judge Butzner voted to grant panel rehearing. Judges Hamilton and Luttig voted to deny panel rehearing and the motion of the EEOC.

No member of the Court requested a poll on the suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hamilton for the Court.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 8, 1995

No. 94-1214

O'Connor v. Consolidated Coin

MANDATE

The judgment of this Court dated 4/21/95 takes effect today.

BERT M. MONTAGUE
CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA CHARLOTTE DIVISION**

C-C-91-277-P

JAMES O'CONNOR
Plaintiff,
v.
CONSOLIDATED COIN CATERERS, CORP.
Defendant.

ORDER

(Filed Jan. 7, 1994)

THIS MATTER is before the Court on Plaintiff's motion, filed August 6, 1993, for a new trial. Since the motion is filed under Federal Rule of Civil Procedure 59, and this Court conducted no trial, the Court will treat it as a motion for relief from judgment based upon newly discovered evidence under Federal Rule of Civil Procedure 60(b).

This Court entered summary judgment against Plaintiff on July 27, 1993. The Court entered summary judgment on the ground that Plaintiff had demonstrated insufficient evidence to link derogatory remarks by Mr. Ed Williams (Plaintiff's boss) about Plaintiff's age to the decision to fire Plaintiff.

The motion presently before the Court is premised entirely upon newly discovered evidence embodied in the affidavit of Philip Dennis. Mr. Dennis's affidavit states, *inter alia*, that the day after Plaintiff was fired, Ed William's [sic] told Dennis his boss (Ted Arts) instructed

him to fire Plaintiff. Dennis asked Williams why Plaintiff was fired and he replied he thought it was because, "all of us were getting old, that Jim was getting old, and that there were three other persons around the office who were turning 50." Dennis Affidavit, pp. 1-2, ¶ 2. Dennis's affidavit also states that Williams told him Ted Arts, not Williams, made the decision to fire Plaintiff.

Plaintiff concludes the Dennis affidavit provides a link between the age derogatory remarks and the decision to fire Plaintiff and creates a genuine issue of material fact concerning who made the decision to fire Plaintiff.

ANALYSIS

The standard of law governing a Rule 60 motion requires that the movant demonstrate:

> 1) the evidence is newly discovered since the judgment was entered;
> 2) due diligence on the part of the movant to discover the new evidence has been exercised;
> 3) the evidence is not merely cumulative or impeaching;
> 4) the evidence is material;
> 5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

Boryan v. United States, 884 F.2d 767 (4th Cir. 1989).

Based upon the Court's review of the Dennis affidavit and the oral argument submitted to the Court, the Court concludes that Plaintiff has failed to demonstrate

either that the evidence in the affidavit would likely produce a new outcome or that Plaintiff exercised due diligence to discover that evidence.

The evidence in the affidavit would not likely produce a different result because it does not definitively establish the missing link between the decision to fire Plaintiff and a prohibited age bias against Plaintiff. The Dennis affidavit does not demonstrate that Plaintiff's firing was motivated by his age. Instead, the affidavit at best demonstrates that Williams believed Plaintiff was fired because of his age. The affidavit neither states that Arts directed Williams to fire Plaintiff because of his age, nor that Williams himself decided to terminate Plaintiff because of his age. Hence, there remains no direct evidence that Plaintiff was fired because of his age.

The affidavit also does not created [sic] a dispute of fact that necessitates the relief Plaintiff seeks. Without some proof of an improper motive for firing Plaintiff, the question of who fired him is not material, even if disputed. Who fired Plaintiff is irrelevant unless it can be shown he was fired unlawfully by someone. Firing an employee without an improper motive is not prohibited by Title VII.

Laying aside the fact that the Dennis affidavit would not likely change the result, it was also not discovered after the exercise of due diligence. Plaintiff cannot deny he had reason to know Dennis would be a worthy person to depose and that, had Plaintiff chosen to, he could have been deposed.

Plaintiff offers two reasons why Dennis was not questioned. First, because Dennis may have been reluctant to tell the truth under oath while on Defendant's payroll. Second, that it would have been too costly for Plaintiff to depose Dennis. Of course, these rationale assume Dennis was known to the Plaintiff as a candidate for deposition. Yet, these reasons do not eliminate the simple fact that Dennis was known to Plaintiff, could have been deposed and was not.

Plaintiff's concern that a witness might not be forthcoming under oath is purely a hypothetical concern that was factored into his litigation strategy. To say that a witness may not have said what the Plaintiff wanted to hear during a deposition does not indicate due diligence was exercised in finding and questioning him. Indeed, had Dennis been questioned and yet not disclosed what he is now saying, it could be more credibly argued that the evidence was not discoverable with the exercise of due diligence. Still, Dennis was not questioned.

Moreover, Dennis was admittedly known to Plaintiff prior to the initiation of his suit as one who had contact with Defendant's management, a person within the class of older employees, and one who would be a likely candidate to unearth evidence of improper company bias against older employees in general and Plaintiff specifically. Yet, for reasons assuredly known to Plaintiff and his counsel, but not particularly relevant to this inquiry, Dennis was not questioned about his knowledge of the circumstances surrounding Plaintiff's firing even though he lived in Plaintiff's home town of Charlotte, North Carolina.

Plaintiff's concern about containing costs is certainly prudent, but it does not show that due diligence was exercised in discovering a known potential witnesses' knowledge about his lawsuit. It only shows that counsel opted for one course of litigation strategy over another within the parameters of his client's limited resources. But this is always the case in litigation. This "prohibitive cost as due diligence" approach would permit virtually *any* undiscovered evidence to be offered up after an unfavorable trial or a summary judgment motion on the ground that it was too costly to find it before the plaintiff lost. That is assuredly not the standard of law for due diligence.

Plaintiff's election to prefer one litigation strategy over another does not transform the decision not to depose Dennis into the exercise of due diligence. Quite to the contrary, it demonstrates that Plaintiff elected not to exercise any diligence at all respecting a known potential witness for reasons wholly within his sound judgment.

NOW, THEREFORE, IT IS ORDERED that Plaintiff's notice for relief from judgment be, and hereby is, **DENIED.**

This the 6th day of January, 1994.

/s/ Robert D. Potter
ROBERT D. POTTER
UNITED STATES
DISTRICT JUDGE

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
SEP 29 1995
CLERK

No. 95-354

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

JAMES O'CONNOR,

Petitioner,

V.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Fourth Circuit Court of Appeals in direct conflict with any other court of appeals in terms of a plaintiff's ability to establish a prima facie case of age discrimination utilizing circumstantial evidence.

2. Did the Court of Appeals alter the requirements of proof of motive in a discrimination case by holding that in order to constitute probative evidence of age discrimination alleged ageist statements must be more than isolated ambiguous comments unrelated to any employment decision.

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No. 95-354

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES O'CONNOR,

Petitioner,

v.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Consolidated Coin Caterers, Corp.,[1] respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, James O'Connor.

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[1] In accordance with Supreme Court Rule 29.1, Consolidated Coin Caterers Corp. is a wholly-owned subsidiary of Canteen Corporation.

OPINIONS BELOW

The Fourth Circuit Court of Appeals affirmed the trial court's grant of a Motion for Summary Judgment in favor of Consolidated Coin Caterers Corp. rejecting Petitioner's claim that he had been discriminated against on the basis of his age in violation of the Age Discrimination in Employment Act. This opinion was issued on April 21, 1995 and was not published.

Petitioner moved for rehearing and suggested rehearing en banc. On May 31, 1995, the Fourth Circuit denied the petition for rehearing and declined the suggestion of rehearing en banc. The court's opinion is reproduced in the Appendix to the Petition for Certiorari. (App. 36-37.) On June 8, 1995, the Fourth Circuit issued an Amended Opinion affirming the trial court's grant of summary judgment, which was published. The court's opinion is reported at 56 F.3d 542 and is reproduced in the Appendix to the Petition for Certiorari. (App. 1-23.)

The Order of the United States District Court for the Western District of North Carolina entering summary judgment in favor of Respondent is unpublished; however, it is reproduced in the Appendix to the Petition for Certiorari. (App. 24-35.) Following the grant of summary judgment by the District Court, Petitioner filed a motion for new trial. The Order of the district court denying Petitioner's motion is unpublished; however, it is reproduced in the Appendix to the Petition for Certiorari. (App. 39-43.)

STATEMENT OF THE CASE

Petitioner's employment with Respondent ended on August 10, 1990. (App. 3.)[2] At the time of his separation, Petitioner was the manager of the Respondent's South District which consisted of only three (3) geographic territories; i.e. Charlotte, Laurinburg, and Shelby, North Carolina. On August 10, 1990, the Petitioner's position as 4C's South District Manager was eliminated as part of a two state organizational restructuring. (App. 4-5.) In August 1990, Petitioner reported to Regional Vice President, Mr. Edward (Ed) Williams who was responsible for Canteen's operations in North Carolina, which included 4C's and Canteen's separate operations in Greensboro and Raleigh. (App. 3.) Prior to the reorganization, the following District Managers reported to Mr. Williams.

Mike Kiser 4C's NORTH District Manager Territories	Allen Hunter CANTEEN District Manager Territories	Jim O'Connor 4C's SOUTH District Manager Territories
Burlington Smithfield Tarboro South Boston (Virginia) Hickory Asheville Albemarle	Raleigh Greensboro	Charlotte Laurinburg Shelby

[2] Citation to the Appendix of the Petition for Writ of Certiorari will hereinafter be referred to as "App." followed by the appropriate page number(s).

(App. 3.) Mr. Williams reported to Mr. Ted Arts, President of Canteen's Central Division.

Prior to July 10, 1990, 4C's South had a larger territorial assignment. However, on July 10, 1990, Mr. Williams significantly reduced the size of 4C's South from six (6) geographic territories to the three (3) territories outlined above. Mr. Williams reassigned three territories from 4C's South to 4C's North which was supervised by Mike Kiser. Mr. Williams reassigned these territories because of his concerns about Petitioner's slow responses in reacting to individual problem accounts. When Mr. Williams made this earlier decision, he had no knowledge of Mr. Art's decision to consolidate the North Carolina and South Carolina organizations. (App. 4.) Petitioner did not claim age discrimination based on the July 10, 1990 territory reduction. (App. A 1a-3a.)[3]

In mid to late July 1990, Mr. Arts notified Mr. Williams regarding a proposed restructuring of the Canteen and 4C's operations in North and South Carolina. Mr. Arts had decided to consolidate into a single region Canteen's North and South Carolina operations and had selected Mr. Williams to manage the new consolidated two-state "Carolinas Region." (App. 4.) In addition, Mr. Arts directed Mr. Williams to combine the management responsibilities previously handled by Regional Vice President Finnell who was responsible for Canteen's South Carolina region and the three North Carolina District

[3] Portions of the deposition of Petitioner contained in the Joint Appendix of the appeal to the Fourth Circuit Court of Appeals are attached hereto as Appendix A to the Respondent's Brief in Opposition.

managers: Mr. Kiser, Mr. Hunter, and Mr. O'Connor. (App. 4.)

Thereafter, Mr. Williams decided to divide the new consolidated Region into two newly organized Districts; one covering the northern part of North Carolina and southern Virginia, which would have six geographic territories; and a second district to cover all of South Carolina and the southern portions of North Carolina, which would have nine geographic territories. (App. 5.)

Once the new organizational structure was established, Mr. Williams selected two managers for the new, enlarged Districts. Critical to his selection of managers was the fact that for each of these new Districts, there was to be significantly greater management responsibilities than had been required for any one of the previous districts of 4C's in North Carolina, or Canteen's South Carolina Region. (App. 5.)

Petitioner was not selected for either of the new expanded District Manager positions. Mr. Williams did not select the Petitioner because each of the new Districts had greater responsibilities; i.e., larger numbers of territories, many more accounts, and many more employees than Petitioner had previously managed in 4C's South. (App. 5-6.) A critical element in Petitioner's non-selection was the fact that prior to Mr. Arts' decision to consolidate the North and South Carolina Regions, Mr. Williams had earlier reduced the size of the 4C's South District supervised by Petitioner, from six (6) geographic territories to only three (3) territories. Mr. Williams' decision in early July 1990 to remove three (3) territories from 4C's South and assign them to 4C's North, which was then supervised by Mike Kiser, was based on Mr. Williams' concerns about Petitioner's slow

responses in reacting to individual problem accounts as the 4C's South District Manager. An additional incident considered by Mr. Williams was his discovery in July 1990 that Petitioner had failed to timely respond to a problem involving food delivery in unrefrigerated trucks. (App. 6.)

SUMMARY OF THE ARGUMENT

The Petition should be denied because no conflict exists between the courts of appeal in terms of the utilization of circumstantial evidence to establish a prima facie case of age discrimination. Contrary to the Petitioner's argument, the Fourth Circuit's application of the fourth element of the McDonnell Douglas test does not act as a "gatekeeper" on the use of circumstantial evidence to establish a prima facie case of age discrimination. Circumstantial evidence, if otherwise probative, can be used to raise an inference of illegal motivation in discrimination cases. The fact that a plaintiff must point to someone outside the protected class when utilizing the McDonnell Douglas test certainly does not foreclose a plaintiff from relying upon an intra-protected-group age comparison as circumstantial evidence of age discrimination under traditional methods of proof. A plaintiff's burden or level of proof required to raise an inference of discrimination using circumstantial evidence is not different, nor any greater, in the Fourth Circuit than in any other circuit. Simply stated, there is no direct conflict among the courts of appeal in terms of a plaintiff's ability to establish an inference of age discrimination using circumstantial evidence.

The Petition should also be denied because the court below did not articulate new requirements of proof to be applied to the alleged ageist comments. The court of appeals

merely applied established case precedent and found the statements unrelated to any employment decision made by Respondent and therefore immaterial to the question of age discrimination. The second question as presented by Petitioner is nothing more than his opinion that the decision below was incorrect and his desire to have this Court review the lower court's application of existing case precedent to the facts in the record. Clearly, this is an insufficient reason to grant a petition for certiorari. No direct conflict among the courts of appeal, nor any conflict between this Court and a court of appeals, is presented; no unsettled question of federal law is presented. Moreover, the petition should be denied because the decision below was correct; the statements identified are not probative of age discrimination.

Finally, the Petition should be denied as to Petitioner's subsidiary questions because none of them presents an issue sufficient to support the granting of a petition for certiorari. All three of these questions are nothing more than Petitioner's opinion that the decision below was incorrect and his desire to have this Court review the lower court's application of the law to the facts. This argument is insufficient to support a grant of certiorari.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS BETWEEN THE CIRCUITS IN TERMS OF THE UTILIZATION OF CIRCUMSTANTIAL EVIDENCE TO ESTABLISH A PRIMA FACIE CASE

Petitioner presents a question that mischaracterizes the Fourth Circuit's application of the McDonnell Douglas test in an age discrimination lawsuit. Petitioner posits that the Fourth Circuit requires that in order to establish a prima facie case one must point to someone outside the protected class. However, this proposition is fatally flawed because it ignores the clear case precedent of this Court and the appellate court below.

The Fourth Circuit has held that the fourth element of the McDonnell-Douglas rubric requires a Plaintiff to prove that "following his discharge or demotion, [he] was replaced by someone of comparable qualifications outside the protected class." O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542 (4th Cir. 1995)(citation omitted). (See Petitioner's App. 8-9.)[4] Other courts of appeal have articulated the same test but require that the plaintiff point to a replacement who was younger, even if that person is within the protected group. (App. 10 n.1.) Petitioner urges that this distinction warrants review by this Court. However, any variance between the courts of appeal in applying McDonnell

[4] Citation to the Appendix of the Petition for Writ of Certiorari will hereinafter be referred to as "App." followed by the appropriate page number(s).

Douglas is not significant and does not affect the ability of a plaintiff to raise an inference of age discrimination by means of circumstantial evidence.

Contrary to the Petitioner's suggestion, the Fourth Circuit's application of the fourth element of the McDonnell Douglas test does not act as a "gatekeeper" on the use of circumstantial evidence to prove a prima facie case of age discrimination. Circumstantial evidence, if otherwise probative, can be used to raise an inference of illegal motivation in discrimination cases. The fact that a plaintiff must point to someone outside the protected class when utilizing the McDonnell Douglas test certainly does not foreclose a plaintiff from relying upon an intra-protected-group age comparison as circumstantial evidence of age discrimination under traditional methods of proof. A plaintiff's burden or level of proof required to raise an inference of discrimination using circumstantial evidence is no different, nor any greater, in the Fourth Circuit than in any other circuit. Simply stated, there is no direct conflict among the courts of appeal in terms of a plaintiff's ability to establish an inference of age discrimination using circumstantial evidence.

The test articulated in McDonnell Douglas is not a rigid, inflexible formula for proving discrimination by means of indirect evidence. As this Court long ago explained, "[t]he facts necessarily will vary [from case to case], and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect in differing factual situations." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973); see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 n.6 (1981) and U.S. Postal Svc. Bd. of Governors v. Aikens, 460 U.S. 711 (1983). Significantly here, the case law in the court

below demonstrates that the McDonnell Douglas formula is not the only way by which a plaintiff may utilize indirect or circumstantial evidence to establish a prima facie case of discrimination:

> In order to establish a cause of action under the ADEA, a plaintiff must demonstrate that but for the employer's motive to discriminate against the plaintiff on the basis of age, the plaintiff would not have been discharged. This can be established in one of two ways. The plaintiff may meet this burden under the ordinary standards of proof by direct or indirect evidence relevant to and sufficiently probative of the issue. In the alternative, a plaintiff may resort to the judicially created scheme established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). . .

EEOC v. Clay Printing Co., 955 F.2d 936, 940 (4th Cir. 1992) (emphasis added). Therefore, the critical question for resolving the Petition is whether a direct conflict exists between the courts of appeal as to a plaintiff's ability to utilize circumstantial evidence to create an inference of age discrimination. There is no such conflict.

As Petitioner correctly identifies in his petition, in some circuits, an intra-protected-group age comparison can be utilized as circumstantial evidence under the McDonnell Douglas rubric. However, not all intra-protected-group

comparisons will satisfy the fourth prong in these circuits. As the Seventh Circuit has explained:

> We hasten to add that this formulation of the fourth factor is not talismanic; a felicitous birth order will not always support an inference of age discrimination. Preference for a 74-year-old job applicant over a 75-year-old is unlikely to suffice in establishing a prima facie case. The disparity in age within the protected class must be sufficient to create a reasonable inference of age discrimination.

Roper v. Peabody Coal Co., 47 F.3d 925, 927 (7th Cir. 1995)(emphasis in original), citing Bienkowski v. American Airlines, 851 F.2d 1503, 1506 (5th Cir. 1988); Kralman v. Illinois Dept. of Veterans' Affairs, 23 F.3d 150, 156 n.7 (7th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 359 (1994); Maxfield v. Sinclair Int'l, 766 F.2d 788, 792 (3rd Cir. 1985), cert. denied, 474 U.S. 1057 (1986); and Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979). Therefore, the fact that a plaintiff was replaced by someone younger within the protected class does not automatically satisfy the fourth prong of McDonnell Douglas.

In the present case, the court below in fact made an intra-protected-group comparison and considered the age difference between Petitioner and Mr. Finnell under traditional principals of proof:

> Conversely, O'Connor contends that his performance was satisfactory and that his evidence tended to establish that Consolidated did not treat age neutrally in discharging him.

> To support these contentions, he relies on: . . . (2) Finnell and Kiser, the younger men, one of whom was outside the protected class, were retained while he and Hunter, the older men, were respectively discharged and demoted; . . .
>
> We conclude that O'Connor failed to demonstrate Consolidated did not treat age neutrally in discharging him. Focusing on retaining Finnell and Kiser, O'Connor is not comparable to Kiser or Finnell since his territory was reduced prior to his termination due to his slow response to problem accounts.

(App. 12-14, 19) (emphasis added). The court below correctly held that in this case the intra-protected-group comparison could not provide a sufficient inference of discrimination because Petitioner and Mr. Finnell were not comparable because of Petitioner's performance problems, which were absent from Finnell's or Kiser's performance at the time of the challenged employment decision. However, the point dispositive of the present Petition is that the Fourth Circuit does in fact utilize intra-protected-group comparisons as circumstantial evidence of discrimination. Therefore, Petitioner was not restricted by the court below in raising an inference of age discrimination.

The Fourth Circuit's application of the fourth element of the McDonnell Douglas test clearly did not act as a "gatekeeper" on the use of circumstantial evidence in the present case nor in any other case. No significant conflict exists between the courts of appeal in the utilization of circumstantial evidence to raise an inference of age discrimination. Accordingly, the Petition should be denied.

II. THE PETITION SHOULD BE DENIED INSOFAR AS IT SEEKS REVIEW OF THE REQUIREMENTS OF PROOF APPLIED TO THE ALLEGED AGEIST COMMENTS.

A. The Fourth Circuit Did Not Articulate New Requirements Of Proof; Rather, It Simply Applied Established Case Precedent To The Alleged Ageist Comments

Petitioner argues that his Petition should be granted to review whether the court below fundamentally altered the requirements for proof of motive in holding that Petitioner failed to make out a prima facie case of age discrimination based on direct and indirect evidence because (a) the decision-maker's statement that petitioner was "too damn old for this kind of work" was not made in the context of replacing petitioner, and (b) other statements of age animus by the decision-makers were not made in the context of terminating petitioner. However, the Petition should be denied because Petitioner's characterization of the question misstates the appellate court's rationale for its rejection of the three alleged age biased comments. Specifically, the court below did not articulate some new requirement of proof in rejecting these alleged comments as probative of age discrimination. Instead, it merely applied established case precedent and found the statements unrelated to any employment decision made by Respondent and therefore immaterial to the question of age discrimination. (App. 16-19.) This analysis required no new or different requirements of proof.

In analyzing the three alleged ageist comments, the court below applied the following well established principals: First, "that isolated and ambiguous statements . . . 'are too

abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination.'" Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989)(quoting Chappell v. GTE Prods. Corp., 803 F.2d 261, 268 n.2 (6th Cir.), cert. denied, 480 U.S. 919 (1987)). Second, that there must be some "nexus ... between the alleged discriminatory statements and any of the employment decisions made by the [employer]." EEOC v. Clay Printing Co., 955 F.2d at 942; see also McCarthy v. Kemper Life Ins. Cos., 924 F.2d 683, 686-87 (7th Cir. 1991)("[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge"). Figures v. Board of Pub. Utils., 967 F.2d 357, 360-61 (10th Cir. 1992)(noting that racial comments are not probative of discrimination unless they are linked to the challenged action); Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438-39 (9th Cir. 1990)(holding that certain statements unconnected to the employment-making process are simply stray remarks that do ont demonstrate discriminatory intent).

The principles applied are consistent with Justice O'Connor's observations in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989):

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-69, 106 S.Ct. 2399, 2404-07 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the

> plaintiff's burden in this regard. . . . What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

Id. at 1804-05 (emphasis added).

As this Court has held: "We do not grant a certiorari to review evidence and discuss specific facts. . ." United States v. Johnston, 268 U.S. 220, 227 (1925). The second question as presented by Petitioner is nothing more than his opinion that the decision below was incorrect and his desire to have this Court review the Fourth Circuit's application of existing case precedent to the facts in the record. Clearly, this is an insufficient reason to grant a petition for certiorari. No direct conflict among the courts of appeal nor any conflict between this Court and a court of appeal is presented; no unsettled question of federal law is presented. Therefore, the petition should be denied.

B. The Petition Should Be Denied Because The Decision Of The Fourth Circuit Is Correct. The Statements Identified Are Not Probative Of Age Discrimination.

Applying the established principles outlined above in section II-A to the three alleged comments, the court below correctly held that these statements were not probative of age discrimination. (App. 16-19.) First, as to the alleged statement made in regard to Don Dillingham's birthday

(App. A 4a-5a.)[5], there is absolutely no argument that this statement has any "nexus" with the Petitioner or the challenged employment decision. As Petitioner's own testimony clearly demonstrates, Mr. Williams statement was made in the "context" of commenting on Mr. Dillingham's voluntary observation that it would soon be his birthday, not in the context of any employment decision, such as, to eliminate Petitioner's position. (App. A 4a-5a.) Clearly, there is no nexus between this alleged statement and Mr. Williams' decision to select Mr. Kiser and Mr. Finnell to fill the two new District Manager positions. See Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994) ("Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions.") citing Leichihman v. Pickwick Int'l, 814 F.2d 1263, 1271 (8th Cir. 1987), cert. denied, 484 U.S. 855 (1987). See also Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1026 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 175 (1993) (the comment that plaintiff's fifty-fifth birthday was a cause for concern "was too ambiguous to establish the necessary inference of age discrimination").

Similarly, the alleged comment made by Mr. Williams in reference to Petitioner's ability to play eighteen holes of golf has no nexus with the challenged employment decision. (App. A 9a-10a.)[6] A comment in reference to the

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[5] The portions of the deposition testimony of Petitioner cited by Respondent are attached hereto as Appendix A to the Respondent's Brief In Opposition.

[6] In his Petition, Petitioner asserts that this statement was made "contemporaneously" with the reduction of his (continued...)

Petitioner's ability to play golf can be viewed as nothing more than an isolated and ambiguous statement and therefore insufficient to support a finding of age discrimination. See Hong v. Children's Memorial Hosp., 993 F.2d 1257, 1265 (7th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1372 (1994) (in a Title VII case, the supervisor's occasional comments that the Korean-American employee should "learn to speak English" was insufficient to show discrimination).

As to the third alleged statement, Petitioner alleges that Mr. Williams made the following remark to him two weeks prior to his termination: "O'Connor, you are too damn old for this kind of work." (App. A 6a-8a.) However, as Petitioner's own testimony demonstrates, there is no nexus between the challenged decision and Mr. Williams' alleged remark:

Q: What were you talking about?
A: I don't remember.
Q: Were you talking about some business matters?
A: I don't remember.
. . .
Q: Do you recall what you were talking about?
A: No.

---

[6](...continued)
territories in July 1990 and that this reduction in territory was "without justification". (Petition for Writ of Certiorari at 9.) Interestingly, no administrative charge was filed challenging this business decision. (App. A 1a-3a.) Petitioner can point to no facts in the record to support these argumentative propositions.

(App. A 7a-8a) (emphasis added). Thus, it is clear that Petitioner has failed to show that the statement was made in any context of an employment decision, such as, replacing Petitioner. Therefore, at best, only unreasonable conjecture or speculation can attempt to connect this alleged statement with Mr. Williams decision to select Mr. Finnell or Mr. Kiser for the new and expanded District Manager positions.

Equally significant, the alleged statement says nothing about younger employees; it does not even purport to contrast or compare Mr. O'Connor with anyone else, young or old! However, the most compelling observation is that Mr. O'Connor has absolutely no facts about what the alleged conversation was regarding. ("Q: Were you talking about some business matter? A: I don't remember.") Clearly, Petitioner's reliance on Mr. Williams' alleged statements simply is insufficient to demonstrate that Mr. Williams wanted to get rid of older workers and replace them with younger workers or that Mr. Williams considered the age of any employee in his decisions involving the two new District Manager positions.

Petitioner also claims that the court's analysis below is in conflict with other circuits and cites Smith v. Great American Restaurants, Inc., 969 F.2d 430 (7th Cir. 1992) and Alphin v. Sears, Roebuck & Co., 904 F.2d 1497 (11th Cir. 1991) to support this argument. (Petition for Certiorari 10.) However, contrary to Petitioner's assertion, these cases are consistent with the analysis of the court below.

In Smith, the court found direct evidence of discrimination based on the following:

> The jury, however, chose to believe Smith and her witnesses, who testified that she was fired specifically for being "too old to cut it." This is not a case in which the employee's charge of illegal discrimination rests on mere conjecture. Here there was ample evidence, including direct evidence, of age-based discrimination. In addition to Smith's own testimony, which was buttressed by the testimony of other GAR employees, there was the testimony of Erma Bolan, who was informed by Mills that he had fired Smith in order to replace her with a younger manager.

969 F.2d at 434-35 (emphasis added). Clearly, Smith presented the very type of direct evidence which is missing from the present case. Petitioner cannot point to any statements which indicate age was a determining factor in Mr. Williams' decisions involving the two new district manager positions. It requires pure conjecture to connect Mr. Williams' alleged statement to his later decision to fill the two new District Manager positions. Therefore, Smith is simply not applicable to the present situation. See also Alphin v. Sears, Roebuck & Co., 940 F.2d 1497, 1499 (11th Cir. 1991) (statement "both of us had been around too long and were too old and were making too much money" held to be circumstantial evidence; however, summary judgment denied based on cumulative circumstantial evidence which included that the employer disciplined the plaintiff for offenses which it ignored in others; especially significant was a discipline dated April 1 for a violation of a policy which plaintiff did not receive until April 9).

C. The Petition Should Be Denied As To Petitioner's Subsidiary Questions Because None Of These Questions Present An Issue Sufficient To Support The Granting Of A Petition For Certiorari.

In footnote 5 of his Petition for Writ of Certiorari, Petitioner argues that this Court should consider as a subsidiary question whether the circuit court erroneously segmented petitioner's evidence into discretely considered segments and thereby failed to consider it in its totality. Once again, as outlined above, this question is nothing more than Petitioner's opinion that the decision below was incorrect and his desire to have this Court review the lower court's application of the law to the facts. This argument is insufficient to support a grant of certiorari. Moreover, a review of the court's opinion below clearly demonstrates that all of the evidence of the Petitioner was considered but the court correctly found it failed to raise any inference that Petitioner was discriminated against: "We conclude that regardless of how O'Connor's claim of age discrimination is viewed, he failed to raise a genuine issue of material fact precluding summary judgment." (App. 20.)

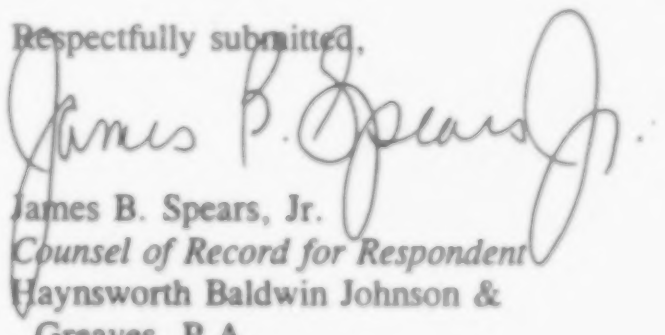
Petitioner next identifies as a subsidiary question whether the circuit court erred in affirming the district court's refusal to grant a new trial. Here, the petition should be denied because Petitioner fails to identify any grounds which would warrant the granting of the petition on this question. A review of the record clearly demonstrates that the court below correctly decided this issue. Once again, the Petitioner wants this Court to review the question simply because he disagrees with the result; however, Petitioner's unhappiness does not warrant the grant of a petition for certiorari.

Finally, Petitioner argues as a subsidiary question whether the court of appeals erred in crediting as fact that petitioner was not even a contender for continued employment. Again, Petitioner mischaracterizes the lower court's analysis. The passage cited by Petitioner is not a theory of Respondent. Moreover, Petitioner failed to raise this issue in the proceedings below and therefore the petition should not be granted. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.13, reh'g denied, 425 U.S. 986 (1976). Moreover, this Court does not grant certiorari to review evidence and discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925).

CONCLUSION

Consolidated Coin Caterers Corp. prays that this Court deny the petition for writ of certiorari because the case presents no issue appropriate for the Court's review, and because the lower court's analysis was not in error.

Respectfully submitted,



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APPENDIX A

Portions of the Deposition Testimony of James O'Connor Contained In The Joint Appendix Of The Appeal To The Fourth Circuit Court of Appeals.

MR. DALY: I don't have a signed copy either. I guess the EEOC has got the only signed copy. The one I sent you, you just signed it and mailed it on without changing it?

A. Yes.

Q. Do you want to stipulate that this was the charge?

MR. DALY: Yes. As far as I'm concerned, that's the charge.

Q. Mr. O'Connor, have you had a chance to review that last page to the EEOC charge?

A. Uh-huh (yes).

Q. Is that the charge you filed with the EEOC?

A. Yes.

Q. When you filed this, were you represented by Mr. Daly?

A. I don't remember. I believe so, but I'm not sure.

Q. Did you actually type this up yourself, or do you know who typed it?

A. I have no idea who typed it.

Q. But you read it and signed it?

A. Yes.

Q. Mr. O'Connor, just explain to me what you were complaining about in your EEOC charge. What had happened to you that you thought was discriminatory because of your age?

A. Well, I originally was led to believe that my job had been eliminated, and all of a sudden, in my neighborhood, one Ted Finnell moved in and had been transferred or moved from South Carolina up to Charlotte. And I felt at that time that the job really hadn't been eliminated; that they had just brought someone in to take my place.

Q. Did Mr. Finnell take these former branches that you supervised?

A. I believe so, but I am not certain because I haven't had anything to do with the company since my termination.

Q. But aside from whatever Mr. Finnell did or didn't do, what is it you are complaining about in your EEOC charge?

A. I felt that I was discharged because of my age.

Q. Anything else?

A. No.

Q. It's your discharge you are complaining about, is that right?

A. Yes.

Q. Do you remember when you filed this charge?

A. I believe it was in December, but I'm not sure.

Q. Of what year?

A. 1990.

Q. The December after you were discharged in August?

A. Yes.

Q. Have you filed any other charges with the EEOC?

A. No.

Q. Have you filed any other charges with any other agency?

A. No.

Q. Mr. O'Connor, I guess we may be going backwards in time, but that may be the more recent way to describe your responsibilities. And you have told us your last position was district manager, food and vending, and you were responsible for three branches, Charlotte, Shelby, and Laurinburg, is that right?

A. Correct.

Q. You had that responsibility beginning in December of '89 until your termination in August of '90?

A. Yes.

Q. What I would like for you to do is move back to the position you had before that and tell me what your title was and your areas of responsibility.

A. I was regional general manager or regional vice president, because they had just changed the title, of what we called 4Cs North with an office in Burlington, North Carolina and with branches that were located in Burlington, Tarboro, Raleigh, South Boston.

A. Oh.
Q. What does that mean?
A. Just I was surprised, shocked, you know. This was nothing that was seen coming. I was taken completely by surprise.
Q. Well, what part of what he told you was your response "Oh" to?
A. That he wasn't considering offering me another position because he knew I didn't want it.
Q. Well, was that true, or did you disagree with that?
A. I don't know. I wasn't offered one, so I didn't have any choice. And the point was that I would have taken a little time to think about it.
Q. Did you ask for time to think about anything?
A. I wasn't offered a job, sir.
Q. Do you recall anything else said in that discussion?
A. Yeah. Ed said that he was sorry that I had gone through the trouble to move to Charlotte.
Q. What else was said?
A. That's all I remember.
Q. Did he say anything about your age at any time in this meeting?
A. No, not that I recall.
Q. You said he had made references to your age on several occasions. When was the last one you recall?

A. Two days previously.
Q. What happened?
A. We were in the car. We were on a tour of Shelby with Don Dillingham, and Don Dillingham made mention of the fact that he was soon to be 50.
Q. That Mr. Dillingham was soon to be 50?
A. Yes, that he was soon to be 50. And Ed said, "It's about time we started to get some young blood in this company."
Q. The three of you were in the car?
A. Yes.
Q. Did anyone respond to that?
A. No, not that I remember anyway.
Q. What was your reaction to that?
A. Well, being that it had been said on numerous occasions preceding that, I didn't say anything.
Q. Did Mr. Dillingham respond to that?
A. I don't remember.
Q. Was there a pregnant pause; was there a dead silence; or did anybody laugh or giggle? Try to describe the environment to me.
A. I don't really remember.
Q. You don't remember?
A. Not to the point where I would say it under oath, no, because I'm not that sure of it.

Q. Did the thought that Mr. Williams might have been kidding cross your mind?
A. No.
Q. Did it ever cross your mind?
A. No.
Q. Has it ever crossed your mind since then?
A. No.
Q. Let's stay with that one for just a minute. Did you ever talk with Mr. Dillingham privately about Mr. Williams' comments?
A. No. I didn't see him after that.
Q. Did you ever talk with anyone else about Mr. Williams' comments that he made in the car with Mr. Dillingham?
A. Not necessarily about that, but I did talk to Allison Shirk.
Q. When?
A. When she was present one day when he made the same statement.
Q. Was this a previous occasion than the one involving Mr. Dillingham?
A. Yes.
Q. How much previously as best you can?
A. Within two weeks.
Q. Is this like in July of 1990?
A. No, no, no. I said within two weeks.

Q. Of what?
A. Well, it probably was. You're right. It was in July. I was thinking that it was later than that. Yeah, it probably was in July, the latter part of July, when he made that statement in front of Allison.
Q. Well, set the stage for me. Where are we? Are we in another car?
A. We're in my office.
Q. In your office at the 4Cs corporate office?
A. Complex, right. Allison Shirk's office was directly adjacent to mine, and she heard the comment because she made a remark about it. And I said to her, "Allison, just --"
Q. Well, before we get to that, why don't you re-create the comment to me.
A. "O'Connor, you're too damn old."
Q. Was this Mr. Williams in your office?
A. Yes.
Q. Anybody else present?
A. No.
Q. What were you all talking about?
A. I don't remember.
Q. Were you talking about some business matter?
A. I don't remember.
Q. But Mr. Williams came to your office?

A. Yes.
Q. And tell me the conversation that you recall.
A. The part that I remember is the part where he said, "O'Connor, you're too damn old for this kind of work."
Q. What was your response to that?
A. I said, "Allison, did you hear that?" And she made a comment to Ed that he shouldn't say things like that.
Q. She was in the next office?
A. Yes.
Q. When you said, "Allison," were you, so to speak, talking through the doorway to her?
A. Yes.
Q. Was your door open?
A. Yes. So was hers.
Q. What was Ed's response to that?
A. I believe he left the office.
Q. Do you recall what you all were talking about?
A. No.
Q. How long was Ed in your office?
A I don't know. I don't remember.
Q. Well, had he been in there 30 minutes or three minutes?
A. I don't remember how long; I don't.
Q. Was it in the morning or afternoon?
A. I believe it was in the afternoon, late afternoon.

Q. Any other occasion where you recall Mr. Williams making any comments about your age?
A. He said it one other time in front of -- that I remember. He said it one other time in front of Steve Carpman.
Q. Set the stage. Where, when, and what were the circumstances?
A. I believe we were in a conference room.
Q. At the corporate offices?
A. Yes.
Q. When?
A. Probably sometime during June or July.
Q. Of 1990?
A. Of 1990.
Q. Who else was present?
A. I don't think anyone was.
Q. Well, were your present?
A. Yes.
Q. And Mr. Williams?
A. Yes.
Q. And Mr. Carpman?
A. Yes.
Q. But no one else?
A. No.
Q. Why were you all together?

A. We might have been watching a golf match, a Monday playoff of -- I guess it was the U.S. Open.
Q. What did he say?
A. Same thing.
Q. Well, what is that?
A. That I was too old.
Q. Why did that come up?
A. I don't remember. Something to do with the golf, I think, playing five days, 18 holes a day. I made the comment, I think -- and I'm trying to remember, but I'm not sure -- it was the fact that I couldn't walk that many rounds of golf for five days to play 18 holes for five days.
Q. And he was responding to your comment?
A. That's correct.
Q. As best you recall, tell me what his comments were.
A. That I was too old.
Q. Too old what?
A. Just too old.
Q. Did he say anything else?
A. No.
Q. Did he say you were too old to work or too old to play golf?
A. He just said I'm too old.
Q. What was your response to that?

J.A. 127

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No. 95-354

In The

Supreme Court of the United States

October Term, 1995

JAMES O'CONNOR,

Petitioner,

vs.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Is a prima facie claim of age discrimination precluded by the fact that the employee who secures the job that the claimant was denied is within the class of persons protected against age discrimination?

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Opinions and Judgments Below

The district court opinion is reported at 829 F. Supp. 155 (W.D.N.C. 1993). It also appears in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at p. 24. The judgment of the district court appears at R. 59. The opinion of the circuit court is reported at 56 F.3d 542 (4th Cir. 1995). It also appears at Pet. App. 1. The Order on Petition for Rehearing with Suggestion for Rehearing *En Banc* appears at Pet. App. 36.

Grounds of Jurisdiction in this Court

This court has jurisdiction of this case pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on June 8, 1995. Pet. App. 38. The Petition for Writ of Certiorari was filed on August 29, 1995.

Statute Involved

The Age Discrimination In Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, provides in pertinent part:

> § 623. Prohibition of age discrimination.
>
> (a) Employer Practices. It shall be unlawful for an employer:
>
> (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

§ 631. Age Limits.

(a) Individuals at least 40 years of age. The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.

Statement of the Case

James O'Connor, the Petitioner, worked for Respondent, Consolidated Coin Caterers Corp., from 1978 until he was terminated on August 9, 1990, at age 56. Respondent is principally engaged in the business of operating cafeterias and vending machines in industrial plants and office locations. Respondent is owned by, and operated as a division of, Canteen Corporation. Ed Williams was Respondent's President and Petitioner's direct supervisor, and also a Canteen Vice-President. Petitioner was, from his hire in 1978 until the end of 1989, the General Manager of "4Cs North", a region of Respondent headquartered in Burlington, North Carolina. "4Cs" is the colloquial name of Respondent. R. 55 ¶ 3.

Under Petitioner's management 4Cs North showed "significant improvement in [its] financial performance" in 1989. Williams Dep. II, 83.[1] Petitioner's job performance rating also increased significantly, from "competent minus" for 1988 to "commendable minus" for 1989. Petitioner earned an incentive bonus of $37,000, which was the largest bonus awarded in the company that year. R. 55 ¶ 4 and attached Trial Ex. 3. However, 4Cs South,

[1] The Williams Deposition was filed May 10, 1993. It was not assigned a docket number.

another region of Respondent, headquartered in Charlotte, North Carolina, did not perform so well in 1989. In December 1989 Petitioner opted to accept Williams's offer of a transfer to 4Cs South as General Manager because he relished the challenge of turning that region around. R. 55 ¶ 5. Williams remained Petitioner's supervisor. Petitioner started work in Charlotte in early 1990. R. 55 ¶ 6. He told Williams that he expected it would take him about 18 months to make 4Cs South profitable. R. 55 ¶ 5.

Beginning on July 10, 1990 Williams began a two stage process that forced Petitioner out of his job. First, Williams assigned responsibility for a portion of 4Cs South to 4Cs North, decreasing Petitioner's territory. During the litigation Williams claimed that this change was made because of Petitioner's "slow responses in reacting to individual problem accounts" and his recent discovery that Petitioner "had not timely responded to a problem involving food delivery in unrefrigerated trucks." R. 48, attached Williams Affidavit ¶ 15. Williams's explanation published at the time, however, said that it was done "to allow a more even distribution of the present volume." R. 55, attached Trial Ex. 13. Petitioner could not respond as to particular alleged "problem accounts" because Williams did not identify the accounts; however, he stated that in his judgment he was proceeding as quickly as was advisable in undertaking the turnaround. Petitioner further explained the steps he had taken to get the trucks fixed, and his reprimand of the responsible manager about the delay in repairs. R. 55 ¶ 8. In any event Respondent made no claim that 4Cs South's financial condition was any worse than it had been when Petitioner arrived six months earlier. Williams Dep. II, 91.

Indeed, Williams conceded that Petitioner "made progress with individual accounts and 4Cs South made some improvement" during Petitioner's tenure. Pet. App. 12, 56 F.3d at 547.

Then, according to Williams in "mid to late July 1990", the President of Canteen Corporation instructed Williams to consolidate all Canteen and 4Cs operations in North and South Carolina into a single region run by Williams, and to combine the management responsibilities previously handled by Canteen's South Carolina Regional Vice President Ted Finnell, by Mike Kiser (Petitioner's replacement) in 4Cs North, by Petitioner in 4Cs South, and by Alan Hunter in Canteen's Raleigh-Greensboro operation. R. 48, attached Williams Affidavit ¶ 9. Williams testified he had not known of this reorganization when he reduced Petitioner's territory on July 10. *Id.* ¶ 17. However, Respondent presented no documents fixing the date of the instructions to consolidate. Then, on August 9, Petitioner was terminated and Alan Hunter, age 57, was demoted to commission salesman. 4Cs South and Canteen's South Carolina operation were combined under Ted Finnell, age 40, and Canteen's Greensboro-Raleigh operation and 4Cs North were combined under Mike Kiser, age 35. R. 55 ¶ 9.

Respondent's age-neutral explanation for the "coincidence" that led to Petitioner's discharge was belied by a series of remarks, interspersed throughout the consolidation process, that revealed severe animus against older employees. Thus, in late June, 1990, Petitioner and Williams were in a company conference room watching the Monday playoff of the U. S. Open Golf Tournament. Petitioner said he didn't think he could walk and play 18

holes of golf five days in a row. In response Williams said that Petitioner was "too old." Pet. App. 19, 56 F.3d at 549.

In the latter part of July, Williams came into Petitioner's office and said to him, "O'Connor, you are too damn old for this kind of work." In reply Petitioner said to the Human Relations Manager, who was seated in another office nearby but within earshot, "Allison, did you hear that?" In response Allison told Williams that he "shouldn't say things like that," and Williams then left Petitioner's office. R. 49, attached O'Connor Dep. I, 45-47. This conversation could have occurred immediately after Arts told Williams to reorganize: the directive from Arts could have occurred in "late July", R. 48, Williams Affidavit ¶ 9, and Petitioner testified that his conversation with Williams occurred "in the latter part of July." R. 49, attached O'Connor Dep. I, 46.

On August 7, 1990, two days before Petitioner was terminated, Petitioner and Williams and another employee were in a company car on company business. The other employee said he was about to turn 50. Williams said in response, "[i]t's about time we started to get some young blood in this company." Pet. App. 17, 56 F.3d at 549.

On the day after Petitioner was discharged, Williams called Philip Dennis, a 4Cs salesman, into his office.[2] Dennis asked why Petitioner was fired. Williams replied "that all of us were getting old, that [Petitioner] was

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[2] The facts stated in this paragraph were presented to the District Court by Affidavit filed with Petitioner's Motion for New Trial. R. 61 (Motion), R. 63 (Affidavit).

getting old, and that there were three other persons around the office who were turning 50." R. 63, pp. 1-2. Four days later Williams called Dennis into his office and complained that Mike Kiser had reported that Dennis was telling people that Petitioner had been fired because he was too old. Dennis told Williams that he was just repeating what Williams had said. Williams made no reply. *Id.*

The 1989 performance rating for Finnell was "competent minus." R. 55, Ex. 8. Petitioner's 1989 rating was "commendable minus," a significantly better rating. Williams made both of these ratings. For the several years preceding Petitioner's termination he placed consistently higher within his salary class than did Finnell. R. 55, Exs. 1, 8.

Proceedings Below

Petitioner filed a complaint in the United States District Court for the Western District of North Carolina, claiming that he had been unlawfully and wilfully discharged from employment by Respondent in violation of the ADEA. R. 1, 3. The only defense tendered was that plaintiff's discharge was "based on reasonable factors other than age." R. 8, p. 2. After discovery the district court granted summary judgment for Respondent. R. 58.

The district court analyzed the case under both the *McDonnell Douglas* paradigm and traditional principles of proof. The court held that Petitioner had not satisfied the fourth element of the *McDonnell Douglas* prima facie case because he did not show that he was replaced by a person outside the protected class. Pet. App. 29, 829 F. Supp. at

158. Then, considering the case as involving a reduction in force, the court found that Petitioner had presented no "objective evidence that the employer has not treated age neutrally." Pet. App. 30, 829 F. Supp. at 158. The court then opined that under traditional principles of proof Petitioner had presented insufficient direct or indirect evidence of discriminatory motivation.

The circuit court affirmed. The court explained that under circuit precedent a prima facie case is stated only when the discharged plaintiff has been replaced by someone "outside the protected class", Pet. App. 10, 56 F.3d at 546, because the ADEA protects only employees over age 40 against age discrimination. This meant that Petitioner could state a prima facie case only if he was discharged in favor of an employee 39 years of age or younger. Thus, under the court's analysis, the fact that he had been fired at age 56 in favor of an individual "only" 16 years younger barred him from stating a prima facie case of age discrimination.

The court also held that Petitioner did not satisfy either the third or the fourth element of the reduction in force prima facie case, each of which involves considering the performance of employees who were retained rather than fired. Pet. App. 10-15, 56 F.3d at 546-48. The court concluded as a matter of fact that Williams had reduced Petitioner's territory on July 10 because of slow response to problem accounts and the unrefrigerated truck problem, and thus that Petitioner was "not a contender" for the August job. Pet. App. 12, 56 F.3d at 547.

The circuit court then analyzed Petitioner's direct and circumstantial evidence of discriminatory animus.

None of the invidious comments were found to have a sufficient "nexus" with the discharge. Pet. App. 15-19, 56 F.3d at 548-550.

Senior Judge Butzner concurred that Petitioner had failed to present a prima facie replacement case, but only because he considered himself bound by Fourth Circuit precedent. He opined that the requirement of a replacement from outside the protected class "has no justification in law or policy." He dissented from the conclusion that Petitioner's direct and circumstantial evidence failed to raise a triable issue. Pet. App. 20-23, 56 F.3d at 550-51.

Summary of Argument

Few employers admit to the discriminatory state of mind which is the ultimate issue in an employment discrimination case. The Court has therefore created a prima facie case which raises a presumption of employment discrimination, because it eliminates the most common reasons for adverse employer action. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (Title VII). This inference of discrimination serves to call forth from the employer an articulation of its reasons for the adverse action. Some courts have, despite *McDonnell Douglas*, required in Title VII firing-and-replacement cases that employees show as part of the prima facie case that they were replaced by someone outside the protected class. The Fourth and Sixth Circuits, contrary to every other circuit, require a showing in ADEA cases that the replacement is outside the protected class, *i.e.*, under age 40. These developments are unwarranted. *McDonnell Douglas* did not require any showing of characteristics of the employee hired instead of the plaintiff, and an ADEA firing-and-replacement case is not distinguishable in terms of most common reasons for adverse employer action.

The establishment of the prima facie case should logically not include a requirement – discrimination in favor of a person too young to be protected by the ADEA – that would effectively create a new exception to the Act. The establishment of a prima facie case is only the first step in proving a violation of a particular statute. The ADEA prohibits discrimination "because of . . . age," 29 U.S.C. § 623(a)(1), not because of membership in a class of persons over 40 years of age. Thus a violation of the ADEA does not, unlike a violation of Title VII, turn on proof of a binary characteristic such as race or gender, but on age, which is a matter of degree. Replacement by a person either inside or outside the protected age group may therefore create an inference of age discrimination. The legislative history and the policy of the ADEA to protect all employees over age 40 also support this interpretation, while the Fourth Circuit rule is illogical: it allows a prima facie case to be made where a 40 year old is replaced by a 39 year old, but not when a 69 year old is replaced by that same 40 year old.

Petitioner easily meets the prima face case requirements of *McDonnell Douglas*. Adding any requirement of a showing of characteristics of his replacement will only encourage the sort of analysis undertaken by the Fourth Circuit, which intensively discussed the characteristics of Petitioner's replacement and even the Respondent's articulated reasons for Petitioner's discharge as part of its prima facie case analysis. This course of proceeding is at

odds with the minimal burden of making a prima facie case and the three-step proof scheme of *McDonnell Douglas*.

Argument

A prima facie case of age discrimination is not precluded by the fact that the employee who secures the job that the claimant was denied is within the class of persons protected against age discrimination.

Nearly 30 years after the ADEA was passed in 1967, it is the rare supervisor – no matter how prejudiced – who is so incautious as to tell an employee who has just been fired that the reason for the discharge is that the employee is too old, any more than employers tell workers that they are being fired for being black, Jewish or female. Instead, employers who want to be rid of older employees normally invent a reason or reasons, relating to the employee's alleged inability to perform the functions of the job, which although purportedly neutral are a pretext for discriminatory animus. As Circuit Judge Posner has explained in a Title VII case,

> Because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against – the cost of discrimination is too great. The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different [protected class], but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative.

Riordan v. Kempiners, 831 F.2d 690, 697-698 (7th Cir. 1987). For this reason, the task of the fact-finder in most age discrimination cases, as in other kinds of discrimination cases, is to sort through various pieces of circumstantial evidence, including generalized expressions of animus (if the plaintiff is fortunate enough to be able to discover them), relative qualifications of the fired and the unfired, statistical evidence and the like, from which discriminatory motive may be inferred.

Because the resolution of circumstantial cases is so central to the effectuation of national anti-discrimination policy, this court's formulation of the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dep't of Cmnty. Affairs v. Burdine*, 450 U.S. 248 (1981), and their progeny has assumed increasing significance.[3] In *McDonnell Douglas*, where the plaintiff claimed

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[3] This Court has never addressed the manner in which a trial court should go about deciding whether circumstantial evidence shows that intentional discrimination based on age has occurred. However, because the ADEA and Title VII are similarly worded, and because of the similarities between their underlying policies and their substantive requirements, *see Lorillard v. Pons*, 434 U.S. 575, 584 (1978), the lower courts unanimously and routinely hold that the *McDonnell Douglas* scheme of presumptions and burden-shifting applies under the ADEA as well. *E.g., Roper v. Peabody Coal Co.*, 47 F.3d 925, 926 (7th Cir. 1995); *Douglas v. Anderson*, 656 F.2d 528, 532 (9th Cir. 1981). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989)

that he had suffered a discriminatory refusal to rehire based on his protests against alleged Title VII violations, the court held that a plaintiff establishes a prima facie case by

> showing (i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applications; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

411 U.S. at 802.

Assuming that the plaintiff can establish this prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, assuming that the employer can articulate such a reason, the burden then shifts back to the plaintiff to prove that, notwithstanding the arguable, articulated reason, the real reason for the adverse action was forbidden discrimination. *Id.* at 804.

Since *McDonnell Douglas* was decided, the Court's cases on the subject have been primarily devoted to formulating the consequences of the establishment of a prima facie case – what the defendant and plaintiff must do at steps two and three of the burden-shifting scheme, and how the finder of fact should analyze the resulting

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(*McDonnell Douglas* approach applies to suits under 42 U.S.C. § 1981); *Newman v. GHS Osteopathic*, 60 F.3d 153, 157 (3d Cir. 1995) (*McDonnell Douglas* applies to disability discrimination cases).

proofs. But the Court's cases have repeatedly described the function of the prima facie case in ways that help determine the necessary content of that case.

Thus, the Court has emphasized that the sole function of the prima facie case is "progressively to sharpen the inquiry into the question of intentional discrimination," *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 986 (1988), by eliminating the most common nondiscriminatory reasons for the discharge of an individual in a protected class: an absolute or relative lack of qualifications and the absence of a vacancy in the job sought. *Burdine*, 431 U.S. at 254 (*citing Teamsters v. United States*, 431 U.S. 324, 358 and n.44 (1977)). Having served this function, the prima facie case raises merely an "inference of discrimination" because it may be presumed that, if there is no explanation for the facts, it is more likely than not that the decision was based on impermissible criteria. *Burdine*, 450 U.S. at 254 (*quoting Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Once the inference is created, the employer need do no more than produce "some evidence" that it had a legitimate, nondiscriminatory reason for its decision; this is only a burden of production, not a burden of proof. *Watson*, 487 U.S. at 986. And, most important, the burden of proving discrimination rests at all times on the plaintiff, *id.*; once the employer's burden of production has been met, the presumption furnished by the prima facie case vanishes, and the question is whether, considering all the evidence, the plaintiff has proved his case by a preponderance of the evidence. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993).

The Court has repeatedly emphasized that, precisely because the burden imposed on the defendant by the establishment of a prima facie case is relatively small, the requirements for establishing a prima facie case are "not onerous," *Burdine*, 450 U.S. at 253, even "minimal." *St. Mary's*, 113 S. Ct. at 2747. Nor is the methodology to be applied in a rigid, mechanized, or ritualistic fashion. *Id.* at 2753 (*quoting Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)).

The decision below represents the culmination of two developments in some of the lower courts that represent precisely the sort of ritualistic application of *McDonnell Douglas* against which this Court has repeatedly warned. First, a few courts of appeals have, in the course of describing the requirements of a prima facie Title VII case, stated that the plaintiff must prove that the person who obtained the job after he was denied it or removed from it must have been "outside the protected class." *E.g., Ang v. Proctor & Gamble*, 932 F.2d 540, 548 (6th Cir. 1991). *Contra, Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 944-945 (8th Cir. 1994). Applying this new requirement strictly to the context of age discrimination, as if it were part of the statute itself, the Fourth and Sixth Circuits have then ruled (in opposition to every other circuit) that, because the class that is protected by the ADEA is persons at least 40 years of age, if the plaintiff was replaced by someone not younger than 40, there is no prima facie case. *E.g., LaPointe v. UAW Local 600*, 8 F.3d 376, 379 (6th Cir. 1993).[4]

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[4] The court of appeals cases are collected in *Rinehart v. City of Independence*, 35 F.3d 1263, 1266 and n.2 (8th Cir. 1994), and at Pet. App. 21-22, 56 F.3d at 551 (Butzner, J., dissenting). It is worth noting in this regard that some courts of appeals, although initially establishing a requirement of replacement by a non-member of the protected class, retreated from that formulation of the prima facie case when they recognized its absurd implications in the age context. *E.g., Kralman v. Illinois Department of Veterans' Affairs*, 23 F.3d 150 (7th Cir. 1994).

Neither aspect of this new gloss on the *McDonnell Douglas* prima facie case is warranted. To be sure, there have been cases under *McDonnell Douglas* in which part of the plaintiff's proofs in support of a prima facie case have included the fact that the job for which the plaintiff was not hired, or from which the plaintiff was removed, was ultimately filled by an individual who did not belong to the protected class. *E.g., St. Mary's*, 113 S. Ct. at 2747 (reciting findings from district court opinion); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730 (5th Cir. 1977). But the Court has repeatedly accepted the proposition that a prima facie case may exist without any regard for the identity of the replacement employee. For example, in *McDonnell Douglas* itself, the employer failed to hire a qualified black employee, and then continued to look for employees of similar qualifications; the Court held that this was sufficient to make out the prima facie case. The prima facie case there did not depend on the race of the employees actually hired. And more recently, in *St. Mary's*, the Court set forth a hypothetical in which a black employee was discharged from a workforce whose minority fraction was far larger than the minority fraction of the population as a whole, and the firing decision was made by a black supervisor to boot. The Court recognized that these facts, which did not include any reference to the race of the employee who was hired instead of the

plaintiff, would make out a prima facie case. 113 S. Ct. at 2750-2751.

A prima facie case is a presumption, a subset of circumstantial evidence which alters, in favor of the plaintiff, the normal requirements of circumstantial proof. This is done for reasons of probability, *Furnco*, 438 U.S. at 577, and from considerations of relative access to proof and the need to effectively implement the national anti-discrimination policy, *see, McCormick on Evidence*, § 343, vol. 2 at 454-455 (4th ed. 1992). These reasons are sufficiently similar in a replacement case and a failure to rehire case such as *McDonnell Douglas* that the same prima facie showing should obtain in each case. Any requirement that characteristics of the replacement be shown as part of the prima facie case will in effect abolish the presumptive character of the prima facie case, and leave discrimination complainants with the very burden of making out a traditional circumstantial evidence case that it was the purpose of the prima facie case to remove.

It is not at all surprising that a prima facie case would not include any reference to the protected status of the replacement employee. After all, an employer may rid itself of a member of a class protected by law against discrimination, for reasons of age animus, only to discover that, for various reasons, it cannot get a satisfactory replacement for the time being from outside the protected class; the discharged individual nevertheless has a cause of action for discrimination. To be sure, the fact that a new employee belongs to the same class as the eliminated employee would be probative in consideration of the employer's contention that it lacked invidious motivation. But the function of the prima facie case is not to

make the final determination, but simply to move the case to the next stage of analysis, where the employer must put forward its legitimate reasons for action.

But even if the replacement employee's nonmembership in the protected class were ordinarily a proper part of the *McDonnell Douglas* prima facie case in cases of race or gender discrimination, it would make no sense whatsoever to import the same consideration into age discrimination cases. After all, age, unlike race or gender, is not a binary characteristic. If a plaintiff alleges that she was fired because she is female, her replacement must either be female or not female. If the allegation is of discrimination against blacks, the replacement is either black or not. The same is not, however, true with respect to age discrimination, because age is a matter of degree. A 68 year old manager may be replaced by a 25 year old, a 39 year old, or a 45 year old – in each case the manager has been replaced with someone substantially younger. Assuming the two employees have similar qualifications, an inference is created that the explanation for the different treatment is age.

Of course, if the statute specified a binary characteristic, by forbidding discrimination on the basis of membership in the class of employees who are between 40 and 70 years old, then such evidence of age discrimination might not be sufficient to create a prima facie case. The language of the statute, however, does not permit such a construction. Section 4 of the ADEA, 29 U.S.C. § 623(a), provides that

> It shall be unlawful for an employer
>
> (1) to . . . discharge any individual . . . because of such individual's age

Section 12 of the ADEA, 29 U.S.C. § 631, entitled "Age limits," provides

> (a) Individuals at least 40 years of age.
>
> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

This language precludes the rule adopted by the courts below. What Section 623 makes unlawful is adverse treatment, including discharge, "because of such individual's age." Under Section 623, such discrimination is prohibited regardless of the age of the *person who benefits* from the discrimination. The statute does make it relevant whether the *individual claiming discrimination* is over age 40, because under Section 631 only persons over age 40 may claim discrimination. But even Section 631 does not purport to authorize discrimination in favor of persons at the younger end of the protected range of ages.

The language of the ADEA supports Petitioner's position in yet another way. Section 4(f) of the statute, 29 U.S.C. § 623(f), creates a number of exceptions to the general rule against discrimination on the basis of age. For example, an employer does not violate the ADEA by following a bona fide seniority system, 29 U.S.C. § 623(f)(2)(A), or by making certain kinds of payments under an employee benefit or early retirement incentive plan that meets various specific requirements. 29 U.S.C. §§ 623(f)(2)(B), 623(i), 623(1). And the employer is expressly authorized by 29 U.S.C. § 631(c) to compel

retirement by employees over 65 who hold bona fide executive or high policy-making positions, so long as their retirement benefits have a minimum value. The very fact that Congress, when it saw a need for exceptions to the ADEA's rule against discrimination, was perfectly capable of enacting statutory language in quite detailed terms, strongly suggests that it did not intend to have the courts craft an additional exception allowing discrimination whenever the favored employee is within the same protected class as the discrimination complainant.

That Congress deliberately structured the ADEA to protect older members of the protected class against younger members of that class is also clear from the legislative debates that preceded passage. Thus, when the ADEA was introduced in the Senate, Senator Javits stated:

> Section 4 of the Bill specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 . . . because he is younger than the man age 52, then he will have violated the act. . . .
>
> 113 Cong. Rec. 31,255 (1967).

Senator Yarborough, the floor manager of the bill, expressly agreed with this analysis. *Id.*

Moreover, a long-standing regulation of the Equal Employment Opportunity Commission has incorporated this analysis. According to 29 C.F.R. § 1625.2(a),

> It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over.

Because the EEOC is the agency charged by Congress with enforcing the ADEA, and because it is specifically charged by statute with promulgating rules and regulations for this purpose, 29 U.S.C. § 628, this regulation is entitled to deference by the courts. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). The proposition that only discrimination in favor of persons younger than 40 can state a prima facie case is flatly inconsistent with this authoritative interpretation.

Nor would a requirement that discrimination be against persons younger than age 40 make any sense as a matter of policy. After all, many jobs, especially managerial and professional jobs, require the sort of experience that only employees over 40 are likely to have. Even an employer with clear anti-age animus is unlikely to be able to find an employee under 40 to fill such a job. "If no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons [in such] jobs." *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1986).

Indeed, such a rule would be extremely illogical. If the object is to prevent employment decisions based on age animus, it is irrational to decide that a prima facie case is created when an employee who has just celebrated his 40th birthday is replaced by a 39 year old who has similar qualifications, but not when a 69 year old who also has similar qualifications is replaced by that same 40 year old.

Turning to the facts of this case, O'Connor has easily established a prima facie case of age discrimination. He meets the first *McDonnell Douglas* criterion because he was 56 years old when he was discharged, and so is within the class of workers protected against age discrimination. He meets the second criterion because he was qualified for the job that he was denied, as shown by his history of successful performance as a General Manager (and particularly in 1989), and the fact that 4Cs South improved under his leadership. He meets the third criterion because he did not get the job. He meets the fourth criterion because the employer continued to seek to fill the job with a comparable person. This showing eliminates the most common reasons for termination equally as well as the *McDonnell Douglas* showing did for the failure to hire involved there. In both cases there was an available job and a qualified protected worker did not get it.

The prima facie case is the initial showing by the employee, sufficient merely to require an explanation. Importing into it a requirement of showing characteristics of the replacement, or other evidence of discrimination, will compromise its simplicity and invite making it the battleground for the whole case. The present case is a good example of how the lower courts have allowed prima facie case analysis to be swallowed by the employer's rebuttal showing. Because Respondent reduced from four to two the number of persons doing General Manager work, the panel majority alternatively applied its reduction in force prima facie case, which requires consideration of Petitioner's performance as

compared to retained employees. Pet. App. 10-11, 56 F.3d at 546.

Accordingly, the court undertook an intensive analysis, such as is typically undertaken in deciding summary judgment motions, of Williams's reasons for reducing Petitioner's territory and Petitioner's performance as compared to Finnell's performance. Pet. App. 11-15, 56 F.3d at 546-48. Based on this analysis the court concluded that the July reduction in territory doomed Petitioner from receiving the August job. The court resolved several material disputed issues of fact in reaching this result, most notably by concluding that Williams did not consider Petitioner's performance in selecting for the August job, Pet. App. 12, 56 F.3d at 547. Williams's own testimony contradicted this conclusion: "In making my management selections [for the two jobs], I considered the capabilities of . . . Finnell and [Kiser, Hunter and Petitioner]". R. 48, Williams Affidavit ¶ 13. This course of proceedings collapsed step two of the paradigm into step one, while removing step three from consideration altogether.

All the circuit courts except the Fourth and Sixth Circuits have rejected the "replacement under 40" requirement. Pet. App. 21-22, 56 F.3d at 551 (Butzner, J., dissenting). All of these courts except the First Circuit require a showing that the replacement was younger; but in wrestling with the question of how much younger, several courts have been driven to a position that effectively abandons giving any presumptive effect to the prima facie case and retreats to the traditional rule on circumstantial evidence. *See, e.g., Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995) ("a sufficiently

younger person to create an inference of age discrimination"); *Roper v. Peabody Coal Co.*, 47 F.3d 925, 927 (7th Cir. 1995) ("the disparity in age within the protected class must be sufficient to create a reasonable inference of age discrimination"). These formulations effectively abolish presumptive proof by making it the equivalent of circumstantial proof. The *McDonnell Douglas* scheme thereby becomes just a format for deciding whether enough circumstantial evidence has been presented, rather that a simply satisfied presumption that requires an explanation from the employer.

Conclusion

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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RESPONDENT'S

BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES O'CONNOR,

Petitioner,

V.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Can a plaintiff satisfy a prima facie case of illegal age discrimination under the ADEA merely by showing that he was replaced by a younger person, even though the alleged replacement was himself within the protected age class?

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STATEMENT OF THE CASE

Petitioner, James O'Connor, sued his former employer, Consolidated Coin Caterers Corporation (hereinafter "Respondent"), alleging that as a result of its August 1990 reorganization, Respondent unlawfully discharged him due to his age, in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (hereinafter "the ADEA"). After extensive discovery, Respondent moved for summary judgment. The district court granted the motion, holding that Petitioner had not presented sufficient evidence to support a prima facie case of age discrimination. (R. 58.) The United States Court of Appeals for the Fourth Circuit affirmed the trial court. This Court granted certiorari, but limited its review to whether Petitioner could satisfy a prima facie case of age discrimination by showing that he was replaced by a younger person, even though the alleged replacement was himself 40 years old and, therefore, within the protected age class.

Respondent is a vending and food services company, which, although separately incorporated, was wholly owned by, and functioned as an operating division of, Canteen

Corporation.[1] (R. 48, Williams Aff. ¶ 3.) Petitioner began working for Consolidated in 1978. (R. 55 ¶ 2.) Just prior to his termination, he held the position of District Manager for Consolidated's South District, reporting to Ed Williams,[2] the Regional Vice President in charge of Consolidated's North Carolina operations. (R. 48, Williams Aff. ¶ 6.) Williams also supervised a Canteen district covering Raleigh and Greensboro, North Carolina, managed by Allen Hunter, and Consolidated's North District, managed by Mike Kiser, which included a number of territories in North Carolina and one territory in South Boston, Virginia. (R. 48, Williams Aff. ¶ 6.)

Petitioner's last performance review, covering 1989, was "commendable minus." (R. 55 ¶ 4.) However, Williams subsequently reduced Petitioner's territories in early July 1990, reassigning one-half of his territories to Kiser because of Petitioner's slow response to problem accounts.

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[1] In accordance with Supreme Court Rule 29.1, Consolidated Coin Caterers Corp. is a wholly-owned subsidiary of Canteen Corporation.

[2] Williams was almost 50 years old when O'Connor's employment ended in August 1990. Williams' date of birth is October 26, 1940. (R. 48 ¶ 1.)

(R. 48, Williams Aff. ¶¶ 15, 17, 18.)[3] Williams also discovered at about that same time that Petitioner had failed to respond timely to a problem involving the delivery of food in unrefrigerated trucks. (R. 48, Williams Aff. ¶¶ 15, 17, 18) After Williams reduced Petitioner's territories, Williams' superior, Ted Arts, President of Canteen's Central Division, informed Williams that the North Carolina region would be consolidated with Canteen's South Carolina region, which was then managed by Ted Finnell, a Regional Vice President. (R. 48, Williams Aff. ¶¶ 5, 7, 8.) Arts selected Williams to manage the consolidated "Carolinas Region" and instructed him to restructure the management responsibilities previously handled by Finnell and the three North Carolina district managers into a more streamlined organization. (R. 48, Williams Aff. ¶ 9.) Williams then combined the two (2) regions into two (2) large districts: a "South District" consisting of Finnell's South Carolina region, O'Connor's remaining territories and the three (3) territories previously reassigned from O'Connor to Kiser; and a "North District",

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[3] Petitioner did not claim that this reassignment was based on his age. In fact, Petitioner's deposition testimony confirmed that he only claimed that his later termination was illegally motivated, and limited his EEOC charge accordingly. (R. 48, Deposition of Petitioner at 7-9.)

which consolidated Kiser's and Hunter's previous territories. (R. 48, Williams Aff. ¶¶ 10, 11.)

Williams selected Finnell to supervise the South District and Kiser to supervise the North District. (R. 48, Williams Aff. ¶¶ 12, 13, 14.) Finnell had been a Regional Vice President and his qualifications to supervise a large territory were well known to Williams, who had directly supervised him for many years before Finnell's promotion to Vice President. (R. 48, Williams Aff. ¶ 13.) Kiser also had shown that he was a capable performer. In fact, he was assigned responsibility for half of Petitioner's territories concurrently with the Petitioner's July 1990 reduction of assigned territories. (R. 48, Williams Aff. ¶ 14.)

Petitioner was not selected for either new District position. These Districts were significantly larger in numbers of accounts and employees and Petitioner's territories had just recently been reduced because of Williams' concerns over Petitioner's performance. (R. 48, Williams Aff. ¶ 15.) As a result of the elimination of Petitioner's job in this consolidation, Petitioner's employment ended. Although Hunter's management position also was

eliminated, he was not terminated or demoted; rather, he was assigned to a sales position. (Williams Dep. II at 102.)[4]

In reviewing the judgment of the district court, the Fourth Circuit conducted a plenary examination of whether Petitioner had shown sufficient evidence of age discrimination. The circuit court held that Petitioner could meet this burden either by employing an incremental proof scheme articulated for Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and modified for cases like the present one, or by ordinary standards of proof, employing either direct or circumstantial evidence relevant to and sufficiently probative of the issue of intentional age discrimination. That court concluded, however, that Petitioner's evidence failed to state a claim under either approach.

The circuit court employed two (2) different modifications of the McDonnell Douglas model. Because Petitioner claimed that Finnell had been retained in his job,[5]

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[4] Mr. Williams' Deposition was filed with the district court on May 10, 1993. It was not assigned a docket number.

[5] The record evidence unequivocally establishes that Finnell did not simply "replace" Petitioner. Petitioner's last job assignment consisted (continued...)

the circuit court applied a prima facie test adapted for a termination/replacement scenario. Under that test, Petitioner was required to show:

> (1) [he] is in the protected age group; (2) [he] was discharged or demoted; (3) at the time of discharge or demotion, [he] was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge . . . [he] was replaced by someone of comparable qualifications outside the protected class.

O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995) (bracketed language in original). The court held that the evidence failed to satisfy a prima facie case under this test because Petitioner's alleged replacement was not outside the protected class. Id. at 546.

The circuit court also evaluated Petitioner's case utilizing a McDonnell Douglas model adapted to a reduction-in-force case. Where a plaintiff does not rely on the age

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[5](...continued)
of managing three (3) North Carolina territories. (R. 48, Williams Aff. ¶ 6.) After the consolidation, Finnell kept all of the Company's South Carolina territories he had managed before and was assigned six (6) additional territories in North Carolina, only three of which had been managed by Petitioner just prior to the consolidation. (R. 48, Williams Aff. ¶ 11.)

characteristic of a replacement, the alternative test would require a plaintiff to demonstrate:

> (1) the employee was protected by the ADEA; (2) he was selected for discharge from a larger group of candidates; (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force of persons in the groups containing some unprotected persons who were performing at a level lower than that at which he was performing.

Id. at 546. The circuit court held that Petitioner's evidence failed to satisfy either the third or fourth prong of this test. Id. at 546-48.

Petitioner's recent performance problems had led to a significant reduction of his territories prior to Williams' learning that Arts had decided to consolidate the North and South Carolina regions. Therefore, the significant reduction in his territories prior to the August 1990 consolidation kept Petitioner from showing either that he was performing at a level substantially equivalent to the lowest level of those who were retained or that unprotected persons were retained in the residual workforce who were performing at a level lower than Petitioner. Id. Although Petitioner contended his 1989 performance rating had been higher than Finnell's, that rating

had long preceded the July 1990 reduction of Petitioner's responsibilities based on Williams' concerns about Petitioner's performance.[6]

The circuit court next analyzed the record evidence utilizing the proof standards that are ordinarily applicable to civil cases. Under this third analysis, Petitioner's evidence was also found deficient because it did not support any inference of age discrimination.[7] Id. at 548-50.

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[6] Petitioner did not demonstrate that Finnell or Kiser had any such performance problems. Significantly, Petitioner did not present any evidence comparing himself to Kiser, the only unprotected employee affected by the consolidation. The circuit court correctly noted that a month prior to Petitioner's dismissal, Williams had determined that Kiser was better able to handle a larger number of territories than Petitioner and had transferred three of O'Connor's territories to Kiser. 56 F.3rd at 547-48.

[7] After the district court granted Respondent's motion for summary judgment, Petitioner moved for a new trial based on alleged newly discovered evidence. That evidence consisted of an affidavit from a former employee (Mr. Dennis) regarding an age-related comment allegedly made by Williams. The district court treated this motion as a motion for relief from a judgment under Rule 60(b) of the Federal Rules of Civil Procedure and denied the motion. (R. 69.) The circuit court affirmed this ruling. 56 F.3d at 550. Although this ruling is not before
(continued...)

SUMMARY OF THE ARGUMENT

The circuit court below held that in a discharge replacement case under the ADEA, the McDonnell Douglas model required the Petitioner to show that he was replaced by a person outside of the protected age group in order to raise a reliable inference of illegal age discrimination. This application of the McDonnell Douglas test was appropriate given the context of this case. A reality of life is that as older workers leave the work force and are replaced, the replacements almost always will be younger. Thus, no inference of age discrimination can be drawn from a mere chronological comparison between the ages of a plaintiff and a replacement. The circuit court therefore properly applied an objective test for determining when a difference in age alone can raise a minimal inference of age discrimination using the McDonnell Douglas model for a prima facie case.

More importantly, though, the court did not confine Petitioner to this single proof scheme. Rather, it adopted a flexible approach that permitted Petitioner to establish a prima facie case through any direct or circumstantial

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[7](...continued)
this Court, Petitioner persists in attempting to argue this evidence in his principal brief. (See Petitioner's Brief at 5-6.)

evidence that might establish a stated purpose to discriminate against Petitioner because of his age or that might support an inference that, but for his age, Petitioner would not have been terminated. That approach gave due consideration to Petitioner's evidence of alleged ageist statements and his reliance on comparisons to two younger retained employees who were the focal point of his claim of disparate treatment, even though one of those employees, Finnell, was within the protected age group. The Fourth Circuit's analysis thus enabled Plaintiff to point to the age of his replacement in an effort to show a prima facie case. However, where Petitioner's only probative evidence was that there was an age difference, the court required that he show that the replacement employee was outside the protected age group, since otherwise the inference created was meaningless. This flexible approach provides the most meaningful measure of a prima facie case in ADEA litigation.

The Fourth Circuit properly affirmed the award of summary judgment to Respondent. Petitioner not only was unable to show that Respondent replaced him with someone outside of the protected age group he did not present any direct or circumstantial evidence that allowed a reliable

inference of disparate treatment. In light of these deficiencies, the circuit court's ruling should be affirmed.

ARGUMENT

Petitioner challenges only one of the tests utilized by the Fourth Circuit to determine whether he satisfied a prima facie case of age discrimination. Specifically, Petitioner questions the circuit court's conclusion in this case that he failed to demonstrate a prima facie case under McDonnell Douglas because he did not show that he was replaced by an employee less than 40 years old. Although this Court has not addressed this precise issue, it has recognized that a minimal prima facie showing in a discharge and replacement setting includes evidence of replacement by someone outside the protected class under Title VII.[8]

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[8] In St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S. Ct. 2742, 2747 (1993), this Court observed:

> Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a prima facie case . . . by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man.

(continued...)

Petitioner's focus on that issue alone, however, oversimplifies the circuit court's analysis of the record evidence. The court below examined whether Petitioner could raise a triable inference of intentional age discrimination using several different proof schemes, all directed at whether Petitioner could establish a prima facie case through any direct or circumstantial evidence that his age was not treated neutrally in the challenged termination decision. This approach was consistent with the usual requirement in these types of cases that the plaintiff carry the initial burden of offering evidence probative of whether the employer based its decision on an illegal factor.

The McDonnell Douglas model used by the court below, and about which Petitioner complains here, was simply one measure of whether Petitioner had met this burden. That model was properly adapted by the court to the facts of this case because Petitioner relied upon his alleged

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[8](...continued)
(emphasis added). See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981) ("[I]t is not seriously contested that [plaintiff] has proved a prima facie case. She showed . . . she finally was rejected in favor of a male . . . ."); and Patterson v. McLean Credit Union, 491 U.S. 164, 186-87 (1989) (black plaintiff replaced by white).

replacement's age to support his claim of alleged disparate treatment.

I. A Prima Facie Case Requires The Introduction Of Facts Sufficient To Establish A Sustainable Inference That The Protected Trait Had A Determinative Role In The Adverse Employment Decision.

This Court has not separately set forth requirements for a prima facie case under the ADEA. However, in McDonnell Douglas, this Court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases."[9] Hicks, ___ U.S. at ___, 113 S. Ct. at 2746. McDonnell Douglas also set forth an example of proof scheme for analyzing

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[9] Although this Court has not specifically required that the proof scheme outlined in McDonnell Douglas be applied to claims under the ADEA, various lower courts have applied that model to ADEA cases. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Smith v. Flax, 618 F.2d 1062, 1066 n.3 (4th Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1010 (1st Cir. 1979); and Price v. Maryland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977).

whether the facts of that case satisfied a prima facie case. However, as this Court later cautioned:

> The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977) (emphasis added). Unfortunately, this Court's directive in Teamsters often has been ignored, and many lower courts have felt constrained to articulate varying incremental proof elements that must be demonstrated in order to establish a prima facie case of employment discrimination. In the process, the inferential quality of a plaintiff's evidence seems frequently overlooked.

At the very least, McDonnell Douglas and its progeny in this Court require evidence that will raise an inference of unlawful discrimination in order to satisfy a prima facie case:

> McDonnell Douglas . . . make[s] clear that a . . . plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not

> that such actions were "based on a discriminatory criterion illegal under the Act."

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (citations omitted) (emphasis added); see also Burdine, 450 U.S. at 253 ("The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."). The Fourth Circuit clearly follows the Court's guidance. See, e.g., Duke v. Uniroyal, Inc., 928 F.2d 1413, 1418 (4th Cir. 1991), cert. denied, 502 U.S. 963 (1991) ("Under any formulation for establishing a prima facie case, the task of the plaintiff is to prove a set of circumstantial facts which, in the absence of a legitimate non-discriminatory explanation, leads one to conclude with reasonable probability that the adverse employment action was a product of age discrimination.")

A prima facie case is not just an exercise that allows a protected person who has suffered an adverse employment decision to demand an explanation from his employer.[10]

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[10] Cf. Holley v. Sanyo Mfg., 771 F.2d 1161, 1165-66 (8th Cir. 1985) (ADEA does not entitle that every plaintiff in protected age group (continued...)

Instead, the prima facie burden acts as a filter that allows only those cases that present sufficient facts of a causal connection between a plaintiff's protected status and the adverse employment decision.[11] It also provides a basis for a finding of illegal discrimination if the employer is silent. As this Court observed in Burdine:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

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[10](...continued)
to a trial simply because he was discharged during a reduction in force.)

[11] "One purpose of the allocation of the burdens of proof and production in [discrimination] actions is to help district courts identify meritless suits and to stop them short of full trial." Steckl v. Motorola Inc., 703 F.2d 392, 394 (9th Cir. 1983). See also Douglas v. Anderson, 656 F.2d 528, 535 (9th Cir. 1981); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1219-20 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981)("[i]t is an obvious purpose of the [McDonnell Douglas proof scheme] . . . to stop unsupported . . . suits short of the necessity for a full dress trial.")

Burdine, 450 U.S. at 254 (emphasis added).[12]

Therefore, this Court has earlier clarified that the prima facie case serves an important role in distinguishing between sustainable claims of alleged illegal discrimination and general employment grievances. Only through the introduction of facts that would sustain an inference of illegal discrimination can a prima facie case serve the important role envisioned by this Court. A lesser showing would not support a judgment of illegal discrimination if the employer is silent. As this Court observed in Hicks:

> We [courts] have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated.

113 S. Ct. at 2751 (emphasis in original).[13] Thus, when an

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[12] See also Hicks, ___ U.S. at ___, 113 S. Ct. at 2748 n.3 ("If the finder of fact answers affirmatively -- if it finds that the prima facie case is supported by a preponderance of the evidence -- it must find the existence of the presumed fact of unlawful discrimination and must . . . render a verdict for the plaintiff" if the employer is silent. (emphasis in original)).

[13] See also Hazen Paper Co. v. Biggins, 507 U.S. ___, 113 S. Ct.
(continued...)

employee protected by the ADEA challenges his termination, the prima facie showing must be minimally sufficient to sustain an inference that age had "a determinative influence" on the discharge decision. Hazen Paper, 507 U.S. at ___, 113 S. Ct. at 1706 (emphasis added). What that evidence may be will certainly vary with the type of case, but it is important nonetheless that lower courts test the quality of that evidence to determine if it adequately raises the issue of intentional discrimination such that it can support a verdict for a plaintiff if the employer is silent.

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[13](...continued)
1701, 1706 (1993) ("In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.")

II. The McDonnell Douglas Test Applied By The Fourth Circuit Properly Required Petitioner To Demonstrate Facts That Would Sustain An Inference That Age Played A Role In His Discharge.

The analytical framework employed by the Fourth Circuit required Petitioner merely to demonstrate the minimum facts that could create an inference of illegal age discrimination in the discharge/replacement setting that he presented to the court.[14] Only one of the tests the court utilized required Petitioner to demonstrate he was replaced by a non-protected employee. This represented an appropriate model for a McDonnell Douglas test of Petitioner's prima facie case because he focused on the age of his alleged "replacement" for an inference that age was illegally involved in his termination.[15] The Fourth Circuit's

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[14] "To establish a 'presumption' is to say that a finding of the predicate fact (here, the prima facie case) produces 'a required conclusion in the absence of explanation' (here, the finding of unlawful discrimination)." Hicks, ___ U.S. at ___, 113 S. Ct. at 2747.

[15] In opposing summary judgment, Petitioner's affidavit pointed to (continued...)

model merely required Petitioner to introduce evidence that met this Court's consistent requirement that a prima facie case should consist of facts which, if otherwise unexplained, will give rise to a sustainable inference of illegal discrimination.

A. The Fourth Prong Of The Prima Facie Test Applied By The Fourth Circuit Merely Required The Introduction Of Facts That Support An Inference Of Age Discrimination.

In a discharge and replacement fact pattern, it is the fourth prong of a prima facie test which must throw off the necessary inference of illegal discrimination. "The fourth element required to establish a 'prima facie case' of

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[15](...continued)
Mr. Finnell, age 40, as his replacement. (R. 55 ¶ 9.) Thus, it was Petitioner who postured his case as a discharge and replacement fact pattern and made the age characteristic of his replacement central to the prima facie inquiry. Petitioner maintained that factual reliance before the circuit court and in his petition for certiorari before this Court. Subsequently, he and the EEOC have tried to distance themselves from any reliance on that allegation as the basis for Petitioner's disparate treatment claim.

discrimination was intended to demonstrate unequal treatment by the relatively objective evidence of replacement by a member of a non-protected class." EEOC v. Western Elec. Co., Inc., 713 F.2d 1011, 1014-15 (4th Cir. 1983). The inference of illegal discrimination is generated by the fact that a non-protected person is somehow favored over a protected person. A sustainable inference cannot be similarly generated merely by a comparison of chronological ages. Numerous courts have applied this analysis in both Title VII and ADEA contexts. See Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995) ("To establish a prima facie case . . . under Title VII, a plaintiff must prove . . . (4) after being discharged, her employer replaced her with a person who is not a member of the protected class."); Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1247 (6th Cir. 1995) (Under Title VII, the fourth prong is satisfied "by showing either that the plaintiff was replaced by a person outside of the protected class or that similarly situated non-protected employees were treated more favorably than the plaintiff."); Walker v. Nationsbank of Florida N.A., 53 F.3d 1548, 1556 (11th Cir. 1995) (Under Title VII and ADEA "employee establishes a prima facie case . . . when the employee shows . . . replacement with a person outside the

protected class."); Hughes v. Brown, 20 F.3d 745, 746 (7th Cir. 1994) ("An employee may establish a prima facie Title VII case by showing that . . . his employer treated similarly-situated employees outside his classification more favorably."); and Sondhi v. Lockheed Missiles & Space Co., No. 93-17207, 1995 U.S. App. LEXIS 31263, at *15-16 (9th Cir. Aug. 1, 1995) ("To state a prima facie case . . . under either Title VII or the ADEA, a plaintiff . . . is generally required to show . . . he was replaced by a member of an unprotected class. . . ."). The Fourth Circuit merely applied this logic to the ADEA claim before it.

By focusing on the treatment of protected and unprotected persons when it evaluated the record evidence, the Fourth Circuit followed the framework utilized by Congress in crafting the Act's prohibitions. Congress recognized that a particular class of persons, those 40 and older, should be protected from age discrimination.[16] While the ADEA forbids discrimination based on an individual's

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[16] As Senator Javits explained regarding the ADEA:

> "Thus, the committee, in my judgment, wisely decided to lower the age limit only to 40, since that is the age where, according to information currently available, age discrimination generally seems to start."

113 Cong. Rec. 31,255 (1967).

age; the Act's prohibitions are limited to individuals who are at least forty (40) years old. 29 U.S.C. § 631(a). Thus, the Act creates a "protected class" and leaves everyone else in an "unprotected class." The emphasis in a disparate treatment case therefore should be on a comparison between plaintiff's treatment as a member of the protected age group and the treatment of similarly situated individuals who are not.

The preamble to the ADEA states that Congress' intention was:

> to promote employment of older persons based upon their ability rather than age; [and] to prohibit arbitrary age discrimination in employment. . . .

29 U.S.C. § 621 (emphasis added). Thus, Congress intended to prohibit a particular type of "discrimination" (arbitrary) against a particular class of persons (those whose ages are 40 and older). As this Court explained in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 176 (1989), "Congress recognized that not all age discrimination in employment is 'arbitrary'." This Court thereafter observed in Hazen Paper that disparate treatment of "older" workers was

> the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to

> be fired because the employer believes that productivity and competence decline with old age. As we explained in EEOC v. Wyoming, 460 U.S. 226, 103 S. Ct. 1054, 75 L.Ed.2d 18 (1983), Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

___ U.S. at ___, 113 S. Ct. at 1706 (emphasis added).[17] Thus, any measure of a plaintiff's prima facie proof in an ADEA disparate treatment case should focus on whether the plaintiff's evidence creates an inference of this type of "stigmatizing" behavior towards an older employee (i.e., a protected class member).

A mere chronological age comparison, whether between a 56 year old and a 40 year old replacement, or between a 41 year old and a 39 year old replacement will not support this type of minimal inference of illegal age discrimination. The mere comparison of ages, without more,

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[17] In EEOC v. Wyoming, this Court observed:

> Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact.

460 U.S. at 231 (emphasis added). cf. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976).

simply cannot sustain an inference that age had a determinative role in any discharge decision. It is a "truism," or fact of life, that when an older employee leaves the work force, a younger person most likely will replace him. No inference of illegal age discrimination is generated from that fact alone because no disparate treatment exists; instead, a court is merely presented with the fact that an older employee is no longer employed and is replaced by someone who most likely will be younger. Thus, the replacement of an older employee with a younger person alone will not support a conclusion that it is reasonably probable that an adverse employment action was the product of illegal age discrimination.

The Fourth Circuit is not unique in this analytical approach. As the Sixth Circuit observed in Laugesen v. Anaconda Company, 510 F.2d 307, 313 n.4 (6th Cir. 1975):

> The progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market while younger ones move in. This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex and national

> origin. Thus, while the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.

Id.[18] Thus, an ADEA plaintiff in a discharge case must present other evidence which satisfies this Court's minimal prima facie requirements as underscored in Burdine, Furnco and Teamsters.

Petitioner mistakenly argues that the Fourth Circuit's approach allows the courts to "craft an . . . exception allowing discrimination whenever the favored employee is

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[18] The Fourth Circuit has also recognized that the natural progression of age impacts how particular evidence should be reviewed in an ADEA case. Thus, in Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980), the court rejected the argument that particular age-related statements were evidence of an illegal motive:

> There was testimony that Barbeau and others had made statements such as that the Division's future lay in its young Ph.D's, and that all employees at some time reached the peak in efficiency. Rather than indicating a discriminatory purpose, however, such statements seem only truisms. In any enterprise, today's juniors will be tomorrow's seniors. Today's seniors can help create a foundation for tomorrow's growth and prosperity, but future realization of the potential of an enterprise lies principally with those who will be in positions of leadership and responsibility in the future.

within the same protected class as the discrimination complainant."[19] (See Petitioner's Brief at 19.) However, this argument fails upon minimal inquiry.

The Fourth Circuit has never foreclosed a plaintiff from establishing a claim of age discrimination simply

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[19] Petitioner and his amici contend that isolated statements from the legislative history to the ADEA and the EEOC's interpretive regulations establish that a disparate treatment case can be premised upon a comparison of the plaintiff to a younger replacement, even if the younger replacement also is more than 40 years old. (See Petitioner's Brief at 19-20.) However, the cited legislative history and regulations do not support Petitioner's argument because they are unrelated to the narrow issue before this Court -- specifically, the sufficiency of evidence required to establish a prima facie case of age discrimination under McDonnell Douglas. Instead, they address only the ultimate question of discrimination and merely recognize that age discrimination can exist even when the person hired to replace the claimant is himself within the protected class. The Fourth Circuit's McDonnell Douglas test is consistent with both the regulation and the legislative history cited by Petitioner and his amici. In any event, it is noteworthy that the McDonnell Douglas proof scheme is a judicially-created allocation of the burdens of proof for a discrimination. The legislative history and regulations cited by Petitioner are totally unrelated to the character of proof that a court should require to raise an inference of illegal discrimination. Therefore, they are unrelated to the issue before the Court and do not support Petitioner's argument.

because the replacement was within the protected class. The fact that an intra-group age comparison, without more, is insufficient to support a prima facie inference of illegal age discrimination does not logically equate to a complete ban on the ability of a 68-year-old to demonstrate he was discriminated against because of his age. Such a plaintiff might establish a claim, for example, by pointing to similarly situated employees outside the protected class who were treated more favorably under similar circumstances, to a pattern of adverse employment decisions affecting persons 40 or older, or to ageist comments having a sufficient nexus to the challenged employment decision.

The fact that a 68 year old's replacement happens to be 42, for example, does not compel any court to ignore other evidence -- when it exists -- to satisfy a plaintiff's burden of showing an inference of illegal age discrimination. The Fourth Circuit has never so held, either in this case or any other case. In fact, none of the various circuit courts which require that a plaintiff point to a replacement outside of the protected class in order to state a prima facie case have taken that approach.[20] Yet this is precisely what Petitioner's argument suggests.

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[20] See cases summarized supra at pp. 21-22.

The McDonnell Douglas proof scheme is not the only method of establishing an age claim, nor is pointing to the age of a replacement the only way to establish a prima facie inference of age under McDonnell Douglas. Thus, Petitioner's argument that the Fourth Circuit's model would create some sort of exception under the ADEA that insulates employers from liability so long as they replace a protected employee with another protected individual is not only incorrect, it mischaracterizes the prima facie models utilized by several circuit courts.

B. The Prima Facie Model Suggested By Petitioner Incorrectly Allows A Prima Facie Case Without Any Evidence Age Played A Role In The Challenged Decision.

Petitioner and amicus EEOC have proposed for the first time here that Petitioner's evidence should have been analyzed using the precise four elements stated in McDonnell Douglas.[21] They contend that the courts below should have

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[21] As outlined by Petitioner in his brief: "These reasons are sufficiently similar in a replacement case and a failure to rehire case such as McDonnell Douglas that the same prima facie showing should obtain (continued...)

determined that he satisfied the fourth prong of those particular criteria because Respondent had a continuing need for a district manager over Petitioner's former territories following his layoff. They also argue that McDonnell Douglas did not require Petitioner to present any more specific evidence about the characteristics of his replacement or about the ultimate issue of discrimination.[22] There are at least two major problems with these arguments.

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[21](...continued)
in each case." (See Petitioner's Brief at 16.) Petitioner forgets that this Court earlier noted that "[t]he importance of McDonnell Douglas lies not in its specification of the discrete elements of proof there required. . . ." Teamsters 431 U.S. at 358 (emphasis added).

[22] Petitioner's Brief p. 21 states:

> The prima facie case is the initial showing by the employee, sufficient merely to require an explanation. Importing into it a requirement of showing characteristics of the replacement, or other evidence of discrimination, will compromise its simplicity and invite making it the battleground for the whole case.

(emphasis added). Neither Petitioner nor the EEOC, which also submitted an amicus brief below, raised this argument before the circuit court. Rather, they argued below that the age of the alleged replacement was an important factor in Petitioner's prima facie case. Petitioner and the EEOC should not be allowed to raise this argument for the first time in this Court having taken a contrary position below.

Perhaps most conspicuously, Petitioner ignores the important role that the prima facie burden plays in all discrimination cases. It requires a plaintiff to present sufficient evidence to create an inference of illegal employment discrimination. This Court observed in Hazen Paper that "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." 507 U.S. at __, 113 S. Ct. at 1706. Thus, an ADEA plaintiff's prima facie case should contain some evidence that demonstrates this sort of nexus;[23] otherwise the standard for a prima facie case becomes virtually meaningless. This Court has already clarified that a more meaningful first step must be taken towards the ultimate issue of illegal discrimination in order to shift the burden of production to the employer. Merely pointing to the fact that the employer continued to need the job functions in question does not infer any age nexus in the context of a discharge/replacement case, like the one here, in which the Petitioner's own proof focused on the fact that someone with a different age was retained. That is the way Petitioner framed his disparate treatment claim, and the

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[23] See discussion supra at 13 to 19.

circuit court properly applied a McDonnell Douglas model that measured that sort of claim.

Petitioner's analysis also ignores this Court's and numerous other courts' admonitions against a formalistic or "cookie-cutter" application of the McDonnell Douglas model when judging prima facie proof. The particular proof elements articulated in McDonnell Douglas are not inflexible, nor applicable to all cases. As this Court declared more than twenty-two years ago:

> "The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [plaintiff] in this case is not necessarily applicable in every respect to differing factual situations."

McDonnell Douglas, 411 U.S. at 802 n.13 (emphasis added). See also Furnco, 438 U.S. at 577 ("[t]he method suggested in McDonnell Douglas . . . was never intended to be rigid, mechanized, or ritualistic." (emphasis added)); and Burdine, 450 U.S. at 253 n.6 ("this standard is not inflexible"). Thus, this Court has never held that the precise four proof elements used in McDonnell Douglas must be applied to all claims or all fact patterns (and should not do so here). Rather, this Court has required the opposite. The elements of a prima facie case that will sustain an inference of illegal discrimination may in fact differ depending on the nature of

the discrimination claim (e.g., race, sex, age) and the particular type of employment decisions being challenged (e.g., hiring, promotion, termination). See Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 719 (1st Cir. 1994)("it is important to remember that the contours of a prima facie case are flexible and situation - specific.").

This sort of flexibility is particularly appropriate in ADEA cases. Various federal courts have recognized the uniqueness of the ADEA. For instance, the Sixth Circuit applies a case-by-case approach in age discrimination cases, rejecting a mechanical or automatic application of the McDonnell Douglas guidelines in ADEA cases. See, e.g., Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1179 (6th Cir. 1983). In Laugesen, the court similarly observed that the legislative history to the Act supported this sort of flexible approach. There the court identified Congress' special concerns for application of the ADEA:

> It is also evident from the [House] Report, that Congress did not desire that the Act be applied formalistically:
>
> > "The case by case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in

> employment occur for the strict application of general prohibitions and provisions."
>
> The foregoing language suggests that perhaps the more strict approach which is evident in the treatment of a Title VII race discrimination case in McDonnell Douglas v. Green may not be desirable here.

510 F.2d at 313 n.4 (quoting 1967 U.S. Code Cong. and Adm. News at 2219-20).

The absurdity of Petitioner's argument is fully illustrated by the juxtaposition of his argument with this Court's analysis in Hicks. Under Petitioner's proposed "simplified" prima facie case, a factfinder that determines an employee has proven by a preponderance of the evidence that he was 40 or over, that he was minimally qualified for his position, that he was terminated and that, thereafter, his employer continued to seek to fill his job, would be compelled to render a verdict for the plaintiff if the employer remains silent. See Hicks, ___ U.S. at ___, 113 S. Ct. at 2748 n.3.[24] Thus, Petitioner's proposed prima facie model would require a finding of illegal age discrimination where there is no hint age played any role in the challenged employment decision. That result flies in the face of Hicks,

[24] Compare Petitioner's Brief at 21.

Burdine, Furnco and Teamsters, and cannot be reconciled with this Court's admonition in Hazen Paper that "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." 507 U.S. at ___, 113 S. Ct. at 1706.

C. Summary.

The Fourth Circuit properly employed a flexible analytical model that required Petitioner's prima facie case to contain at least some evidence from which one could infer that Respondent discriminated against him because of his age. That minimal evidence could have included evidence that Respondent retained an employee less than 40 years old in the job in question or any other circumstantial or direct evidence that Petitioner's age motivated the decision to terminate his employment. The mere fact, as Petitioner argued below, that someone younger was retained or, as Petitioner now argues, that Respondent continued to have a need for a position similar to the position Petitioner previously held is too nebulous to have created that sort of minimal inference required under this Court's precedents.

III. **The Fourth Circuit Correctly Decided The Ultimate Issue Because There Is No Evidence Age Played Any Role In Defendant's Decision; Therefore Remand Is Unnecessary.**

"[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." Hazen Paper, 507 U.S. at ___, 113 S. Ct. at 1705. Therefore, in order to establish a prima facie case under the ADEA, a claimant must introduce some evidence that raises an inference of a causal nexus between the claimant's age and the challenged employment decision. "Whether a prima facie case has been established is a fact specific inquiry: Would an ordinary person reasonably infer discrimination if the facts presented remained unrebutted?" Walker, 53 F.3d at 1556 n.12 (emphasis added).

In the present case, the Fourth Circuit satisfied the role any court must fulfill when evaluating whether an age discrimination claimant has minimally satisfied a prima facie case. It fully examined whether Petitioner had developed sufficient facts to sustain an inference of a causal connection between the claimant's age and the adverse employment decision. The court determined that Petitioner's evidence

failed to raise any inference that Petitioner had been the victim of intentional age discrimination.

In part II.A. of its opinion, the circuit court held that Petitioner could not establish an inference of discrimination based solely on the age of his alleged replacement. However, the court's analysis did not end there. In Parts II.B., and III. of its opinion, the circuit court reviewed the record evidence proffered by Petitioner and held that it did not establish a prima facie case.[25]

The Fourth Circuit's analysis exhibited the flexibility envisioned by this Court in McDonnell Douglas. The court sought to determine if Petitioner could show that following his discharge he was replaced by someone of comparable qualification outside the protected class or whether there existed some other evidence indicating the employer did not treat age neutrally. That approach allowed Petitioner every

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[25] Even if the record evidence had satisfied the fourth prong of the Fourth Circuit's McDonnell Douglas test, Petitioner still could not have established a prima facie case under McDonnell Douglas. As fully outlined in the opinion of the Fourth Circuit, and the amicus brief of the Equal Employment Advisory Council, Petitioner could not demonstrate he was performing at a level which satisfied his employer's legitimate expectations at the time of the challenged decision. Thus, he could not satisfy the third prong of the McDonnell Douglas test.

opportunity to establish a prima facie case; however, the record facts were simply insufficient to sustain a minimal inference of illegal age discrimination.[26] Accordingly, the decision of the Fourth Circuit should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the Fourth Circuit correctly decided this case. Even though the McDonnell Douglas test is perhaps overly formalistic for use in an ADEA discharge replacement case, the objective, "bright line" measure employed as the fourth prong of that test here provided the most objective measure of whether the fact of Petitioner's alleged replacement's age was enough to

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[26] As in any other form of civil suit, a plaintiff in an ADEA suit has the burden of proof. Thus, when confronted with a summary judgment motion, the ADEA plaintiff cannot rest on his pleadings, but must demonstrate specific, material facts that raise a genuine issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Petitioner's simply did not meet this burden in the present case because his evidence did not raise a genuine issue of age discrimination against him.

raise an ADEA issue. More importantly, though, the Fourth Circuit focused on whether Petitioner, through any method of proof typically employed in a civil suit, had raised an inference that, but for his age, he would not have been terminated. Petitioner's case proved deficient regardless of the measure employed.

Dated this 1st day of February, 1996.

Respectfully submitted,

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APPENDIX

APPENDIX

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., provides, in part:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that --

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment

because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

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In The

Supreme Court of the United States

October Term, 1995

JAMES O'CONNOR,

Petitioner,

vs.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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REPLY ARGUMENT

Review was granted in this case solely to consider whether, in an age discrimination case, the plaintiff must show, as part of his prima facie case[1] under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), that her or his replacement was a person who was younger than age 40, the minimum age for employees to be protected against age discrimination. Nonetheless, respondent devotes the large majority of its brief to seeking affirmance on a Question Presented in the Petition that was not accepted by the Court – whether summary judgment was proper against petitioner even if his replacement was under age 40. Although we do not believe the latter question is properly before the Court, we will address it, in Section 3 of this brief, after replying to respondent's brief discussion of the issue that has been accepted for review.[2]

Respondent acknowledges that, as we argued in our opening brief, the purpose of the *McDonnell Douglas* scheme is to establish a framework for deciding whether,

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[1] The *amicus* Chamber of Commerce points out, Br. 6 n.3, that petitioner's brief (and indeed every other brief filed) used the phrases "prima facie case" when what was more precisely meant was "presumption." But, since the Court continues to use "prima facie case" for the *McDonnell Douglas* presumption, so also will petitioner. *See, St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2751 (1993).

[2] The brief of the respondent's *amicus* Equal Employment Advisory Council strays even further from the question presented in its claim that petitioner seeks to avoid showing that he was performing at a satisfactory level. Petitioner acknowledges his obligation in that regard and believes that he has met that burden as defined in *McDonnell Douglas*. This issue is also addressed very briefly in Section 3 of this brief.

if the defendant offers no non-discriminatory explanation for its adverse employment decision, the fact-finder could properly infer a discriminatory motive. In our opening brief, we argued first that the *McDonnell Douglas* scheme does not require **any** showing about the characteristics of the employees who were hired or retained in place of the discrimination plaintiff, and second that, even if characteristics of the replacement should be considered at this stage, the only question should be whether the replacement was younger than the plaintiff, not whether the replacement was too young to be protected by the ADEA at all. In this reply brief, we begin by addressing each of these questions, and then respond to the various alternate grounds for affirmance of the decision below that are presented by respondent and its *amici*.

1. If The Replacement's Age Is To Be Considered At All, It Should Suffice That The Replacement Is Younger, Without Deciding The Extent Of The Difference.

Assuming that it is necessary to consider at least some of the characteristics of the replacement employee at all, respondent argues that, as a matter of experience, almost all replacements will be younger than the alleged victims of age discrimination. Accordingly, it contends, no inference of discrimination can be drawn merely because a younger person took the job of an older one. Br. at 25. Instead, it argues, the Court should allow a prima facie case only when there is a bright line between the plaintiff and the replacement. Because membership *vel non* in the protected class is a bright line that has an explicit basis in the statute, respondent argues that this

should be the fact that makes or breaks an ADEA prima facie case.[3]

There are several difficulties with that approach. First, to the extent that it considers characteristics of the replacement, together with the statistical likelihoods that replacements will have certain characteristics, it calls into question the utility of *McDonnell Douglas* in many Title VII cases. Thus, for example, more than 80% of the Americans are white, and so, statistically speaking, when a black employee is replaced it is more likely than not that the replacement will be white. Similarly, in national origin discrimination cases, when an Italian-American employee is replaced, it is quite likely that the new worker will be of some other national origin. And most workers do not exercise their rights under Title VII; thus, when a worker who exercises those rights is replaced or passed over (the precise facts in *McDonnell Douglas*), it is quite likely that the worker who is hired or retained will be one who did not exercise his or her rights under the statute. These likelihoods, however, do not warrant discarding the *McDonnell Douglas* scheme in race, national origin, or retaliation cases under Title VII.

Nor is there a good reason to hold that a *McDonnell Douglas* prima facie case must include proof of particular degrees of age differential. The defect identified by the Fourth Circuit here was that petitioner's replacement was 40, which it considered to be "too old" to enable him to establish a prima facie case, whereas if his replacement

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[3] The brief of the National Retail Federation, at 1-2, assures the Court that younger employees really are better. Its argument is with Congress, however.

had been 39, he would have met his burden. But if the purpose of the test is to assure that only permissible inferences of discrimination are allowed to go forward, it is difficult to justify ruling as a matter of law, in two cases with identical facts except that the replacement in one is 39 and the other 41, that an age discrimination plaintiff aged 65 would be entitled to proceed in one but not in the other. Indeed, under respondent's analysis, because age 40 is the magic dividing line, the two replacements could be born within a week of one another, and the results different, so long as the date of replacement fell between their two birthdays. Thus, so far as the Fourth Circuit drew a sharp line at age 40, that line is wholly irrational in terms of the permissibility or not of drawing an inference of discrimination regarding the defendant's conduct.

There is no reason to import these matters into the prima facie case. To be sure, the fact that the replacement worker was over 40 can be argued to the fact finder as evidence to support an inference of no discrimination. And, of course, as the age of the replacement worker approaches that of the plaintiff, the inference of age discrimination grows progressively weaker, just as it grows stronger as the gap in ages increases. But these matters are best considered in conjunction with justifications that the employer articulates in response to the plaintiff's prima facie case.

The addition of a requirement of showing anything at all about the replacement creates opportunities for discriminatory employers to find a replacement who will insulate them from liability. The employer can simply hire an older replacement until the threat of suit passes. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

A large employer with a small minority contingent could dismiss all its minority employees and require that the remaining employees take up the slack. *Meiri v. Dacon*, 759 F.2d 989, 996 n.9 (2d Cir. 1985). Discrimination in the workplace is varying and manifold in its manifestations, and the rule proposed by respondent would inflexibly prevent plaintiffs from making a case of discrimination even when discrimination in fact occurred.

The *amicus* Chamber of Commerce's plea for a bright line, ten-year difference should also be rejected. Apart from the dubious authority for the Court to draw bright lines comparable to a statute of limitations when Congress has not done so, there is nothing magical about a ten year difference in terms of the intent of the employer. To be sure, the extent of the age difference between the hired and fired will often be highly probative of a discriminatory intent or lack of one, but in the end that difference is only one factor that will be weighed by the jury along with the rest of the evidence. More importantly, a ten year dividing line would be a blueprint for evasion: just replace the fired worker with someone less than 10 years younger, and keep doing it forever. The only dividing line that the law allows is that the hired worker be younger than the fired worker; everything else goes to the strength of the inference.

The addition of a requirement of showing replacement characteristics is also inadequately general to serve as an element of a presumption. The *McDonnell Douglas* presumption is artfully designed to be available to all who may be affected by unacknowledged discrimination. Adding a "substantially younger" requirement, for an example, will make the presumption underinclusive

because not all cases of actual discrimination will involve a substantially younger replacement. The Fourth Circuit rule is so especially underinclusive as to be irrational in its coverage. It is underinclusive particularly for older claimants, who are less likely to be replaced by persons under 40. *See, McCorstin v. United States Steel Corp.*, 621 F.2d 749, 754 (5th Cir. 1980) ("Because of the value of experience, rarely are sixty-year olds replaced by those under forty"). It is irrational because it bears no relation whatever to the prohibitions of the ADEA, which prohibits discrimination against "any individual" on the basis of "such individual's age," 29 U.S.C. § 623(a)(1), not discrimination vis-a-vis persons under 40.

The various suggested additional fourth elements will just create more litigation without assuring any greater reliability. A "substantially younger" requirement, for example, would soon produce a different age difference in every circuit and would be uncertain and uneven in its application. A discharged employee may not know who replaced him, much less know whether a complex reorganization was discriminatory. In large companies the replacement may be selected by a person other than the terminator, and in this circumstance the replacement's age has no evidentiary force at all. Our national policy against employment discrimination requires that the presumption of discrimination be kept simple and inclusive, to maximize relief to victims of unlawful employment discrimination.[4]

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[4] Respondent, but not any of its amici, appears to claim that four circuits have recently held in favor of the under-40 requirement. Br. at 21-22. None of the cited cases so held. As for *Meinecke v. H&R Block of Houston*, 66 F.3d 77 (5th Cir. 1995), Respondent quotes only a portion of the case. The Court clearly says in the same paragraph which respondent incompletely quotes that "replace[ment] by someone younger" is sufficient. 66 F.3d at 83. As for *Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995) (Title VII), the quoted statement is dictum because the replacement was age 24. The Eleventh Circuit adheres to the "younger" rule when the issue is presented. *Corbin v. Southland Intern. Trucks*, 25 F.3d 1545, 1549 (11th Cir. 1994) (ADEA). Respondent cites *Hughes v. Brown*, 20 F.3d 745 (7th Cir. 1994) (Title VII), but it is dictum because a person of a different race was given the promotion at issue. The law of the Seventh Circuit is, as held in the later case of *Kralman v. Illinois Dept. of Veteran's Affairs*, 23 F.3d 150, 155 (7th Cir. 1994), that a "younger" replacement is all that must be shown. Finally, Respondent cites *Sondhi v. Lockheed Missiles and Space Co.*, No. 93-17207, 1995 U.S. App. Lexis 31263, at *15-16 (9th Cir. Aug. 1, 1995), an unpublished decision. Petitioner does correctly quote this case; but *Sondhi* itself erroneously claims that its rule derives from *Wallis v. J.R. Simplot*, 26 F.3d 885, 891 (9th Cir. 1994). The *Wallis* requirement was, however, "replace[ment] by a substantially younger employee."

2. The Court Should Decline To Reformulate The *McDonnell Douglas* Prima Facie Case Presumption Because There Are No Pertinent Distinctions Between A Title VII Refusal-To-Hire Case Such As *McDonnell Douglas* And The ADEA Firing-And-Replacement Case Presented Here.

Respondent argues that it is necessary to consider the age of the replacement employee because, if the replacement is close in age to the plaintiff, that makes it much less likely that the age of the plaintiff was the reason for his adverse treatment. Appealing to the fact that the reason for the *McDonnell Douglas* scheme was to eliminate the most likely justifications for discharge, and thus

avoid the need to litigate frivolous or weak cases, respondents suggest that this is a good addition to the prima facie case.

We have no doubt that there are a variety of pieces of evidence that might make it less likely that the employer had a discriminatory reason for its action. But if courts are willing to consider the age of the beneficiary of the discrimination, then it is, indeed, somewhat difficult to see why other characteristics of the beneficiary should not be considered. Why not the question of how good a worker he is? Why not his daily production statistics? Surely, everything that will eventually become relevant to the ultimate question of discrimination can be imported into the construction of the prima facie case.

What this line of analysis ignores, however, is that the genius of the prima facie case is its very simplicity. The prima facie case focuses on objective characteristics of the plaintiff, which can easily be shown by the plaintiff based on his own knowledge, and without substantial discovery, in deciding whether the case should go forward to the next stage at which the employer must provide responses which, in turn, must be evaluated in light of the evidence.

The elements of the *McDonnell Douglas* prima facie case were not idly formulated. The unanimous Court that formulated them did not include any element looking to the characteristics of the person who ultimately filled the job or any other matter of defense, despite that the record presented strong defense evidence of job-related criminal conduct by the applicant. *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792 (1973). Likewise, in *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), a unanimous Court[5] again held that the presumption did not require any showing of qualifications of persons who got the job or other matters of employer defense, despite the employer's showing that it had hired 16% black bricklayers in a labor market that had only 5.7% available black bricklayers. 438 U.S. at 571-2. Replacement characteristics were not inadvertently omitted, but were omitted because they were not needed in order to eliminate "the two most common reasons on which an employer might rely," lack of qualifications and lack of vacancy. *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Matters of defense were relegated to a later stage in the proof scheme. The Court has recently again indicated, in a hypothetical strikingly similar to the case at bar, that the presumption applies without consideration of defensive matters. In *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2750-51 (1993), the Court posed a hypothetical in which a black job applicant was rejected by a black decisionmaker. Rejection by a decisionmaker of the same race is substantially equivalent, in terms of evidentiary weight, to replacement by a substantially younger worker; yet the presumption there applied was as originally formulated in *McDonnell Douglas*, and the race of the decisionmaker thus was not an element of it.

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[5] Justice Marshall wrote a separate concurring and dissenting opinion for himself and Justice Brennan in which he explicitly agreed with the Court's opinion on the prima facie case issue. 438 U.S. at 582.

Respondent and its *amici* argue that characteristics of the replacement employee must be added to the prima facie ADEA case, but they do this without attempting to say why this case is different from *McDonnell Douglas* in any relevant aspect. There is nothing about the ADEA as opposed to Title VII, or about a failure-to-hire case as opposed to a firing-and-replacement case, that should disturb the presumption so carefully laid down in *McDonnell Douglas*. No opposing brief states any material difference between these cases. Certainly the two most common reasons for not hiring or for dismissing an employee are the same in both cases.

A presumption is a set of facts which has been judicially or legislatively determined to create an inference if the set of facts is proven by a preponderance of the evidence. Fishman, *Jones On Evidence*, § 4.2, at pp. 301-02 (7th ed., 1992). A presumption is a crystallized inference. Presumptions are created for one or more of three main reasons: to correct an imbalance resulting from one party's superior access to proof; for reasons of social or economic policy; and based on inherent probability. *Ibid.*, §§ 4:4-4:8. All three reasons are promoted by the *McDonnell Douglas* presumption. First, the Court has specifically identified inherent probability as one reason for the *McDonnell Douglas* presumption. *Furnco*, 438 U.S. at 577 ("these acts . . . are *more likely than not* based on the consideration of impermissible factors") (emphasis added). Second, in many cases, especially those involving large employers, a claimant will not know the age of his replacement, so lack of access to proof is another reason for not requiring any showing of characteristics of the

replacement. The presumption promotes procedural fairness by ensuring that discrimination plaintiffs have their day in court despite the often insuperable difficulty of obtaining direct evidence of discriminatory intent. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Third, the strong national policy against employment discrimination underlies the presumption. *Cf., Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973).

Presumed facts are not always true; some properly addressed, stamped and mailed letters fail to reach their destination. *Rosenthal v. Walker*, 111 U.S. 185 (1884). Nevertheless, the presumption creates a legal inference in the absence of evidence to the contrary. So too, the termination of a qualified protected employee, without explanation, from a position that the employer needed to have filled, creates a legitimate suspicion that the termination was motivated by discrimination on the basis of age. *McDonnell Douglas* and *Furnco* indicated that no showing of replacement characteristics or any other matter of defense needed to be shown initially by the claimant. Those cases have weighed the risk of error and decided that it is more than overbalanced by the employer's opportunity to make a rebuttal showing of its reasons. No reasons have been advanced as to why the Court should change this basic judgment.

In sum, we urge the Court to reaffirm this basic teaching of *McDonnell Douglas*, that none of the characteristics of the replacement need to be considered, making it unnecessary to consider the remaining arguments in this reply brief.

3. The Issues Of Whether Petitioner Presented A Direct Or Circumstantial Case, And Whether Petitioner Was More Qualified Than His Replacement, Are Not Before The Court; If They Were, Ample Evidence Was Presented.

The circuit court held that petitioner had not made out a prima facie case because his replacement was not under 40. The circuit court then held that the case should not be analyzed as a reduction in force, and further that petitioner had produced insufficient direct and circumstantial evidence. The Petition for Certiorari presented the "under-40" question and the direct and circumstantial evidence question. There was no Cross-Petition. Review was granted only on the "under-40" question. Respondent now seeks to have the Court affirm on the issue which the Court declined to hear, and which neither petitioner nor the EEOC have briefed, arguing that petitioner presented no direct or circumstantial evidence beyond the age difference between petitioner and his replacement and indeed that petitioner lacked sufficient qualifications by comparison with his replacement. Br. 36-38. *Amicus* Equal Employment Advisory Council joins in this surprise attack as well, arguing that no prima facie case can be shown unless the claimant "was performing up to his employer's legitimate expectations." Br. at 14, *quoting Collier v. Budd Co.*, 66 F.3d 886, 889 (7th Cir. 1995). These questions are not before the Court. Certiorari was not granted on them, and the EEOC now has no opportunity to brief them. It is neither fair nor appropriate to allow them to be injected into the case at this point.

If these questions were before the Court, however, ample direct and circumstantial evidence was presented

that petitioner had been discriminated against on account of his age and that he was more qualified than his replacement.

Petitioner showed a 12-year history of successful performance as a manager, R.53 at attached Trial Exhibit 1, and particularly a successful performance in 1989, the year before he volunteered to move to Charlotte to take over a troubled division. His 1989 year-end performance evaluation, by Ed Williams, the man who fired him eight months later, was "commendable minus." R.53 at attached Trial Exhibit 4. In respondent's lexicon "commendable" means "a seasoned employee who is looked upon as a production or conceptual leader within an area." R.53 at attached Trial Exhibit 3. Petitioner received the largest performance bonus in the company for 1989. R.53, Plaintiff's Affidavit 4. Six months later Williams began to make age-biased remarks to him. Most tellingly, in the latter part of July 1990, Williams said, "O'Connor, you are too damn old for this kind of work." R.49 at attached O'Connor Dep. I, 47. This remark could have been made immediately after Williams decided to discharge Petitioner.[6]

Respondent claimed that Petitioner was not even considered for the new job because Williams had earlier reduced his territory. *See*, Pet. App. 12., 56 F.3d at 547

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[6] The "too damn old" remark occurred "in the latter part of July." R.49 at attached O'Connor Dep. I, 46. Williams testified that his boss, Ted Arts, called in "late July" with the directive to reorganize. R.48, Williams Affidavit ¶ 9. (Unfortunately Petitioner's Brief failed to make clear, at 4, that Ted Arts was the President of Canteen Corporation and Williams' boss.)

(1995). But, Williams testified that he considered petitioner to be a candidate for the August job.

> In making my management selections [per Arts' directions], I considered the capabilities of . . . Finnell and the three 4Cs District Managers who reported to me in North Carolina.

R.48, Williams Affidavit ¶ 13. And, according to a company memorandum written by Williams, the reason for the July reduction in petitioner's territory was to "allow a more even distribution of the present volume" and had nothing to do with his performance. R.55 at attached Trial Ex.13.

Respondent proffered no evidence of any reason for its reorganization and admitted that petitioner's division had improved during his tenure. Pet. App. 12, 56 F.3d at 547. Petitioner also showed that he was replaced by a 40 year old with a less outstanding work history. Finnell's prior "competent minus" rating meant that he was performing on the low side of competent. Also, Williams had not supervised Finnell since the end of 1989. R.48, ¶¶ 6, 7.

Petitioner thus presented both direct and circumstantial evidence of age discrimination. Direct evidence is "evidence which, if believed, would prove the existence of a fact . . . without any inference or presumptions." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993), *quoted at* Pet. App. 16, 56 F.3d at 548. The ultimate facts that petitioner must prove are that his age motivated Williams to discharge him. *See, Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993). Williams' statement, "O'Connor, you are too damn old for this kind of work,"

made shortly after Williams' decision to terminate petitioner, is direct evidence that petitioner's age motivated Williams to terminate him. This is earwitness testimony. No inferences are required. Petitioner heard Williams confess his unlawful motive. Arguably petitioner has earwitness testimony only as to Williams' intent, and only "smoking gun" (circumstantial) evidence of the connection between his intent and his action – Williams did not say "O'Connor, you are too damn old for this kind of work *and therefore you're fired*" – but the difference is academic. Either direct or circumstantial evidence suffices, and the circumstances readily allow the *corpus delicti* inference to be made here because the discriminatory remark could have been made immediately after the decision to terminate was reached. *See*, n.6, *supra*.

The courts below faulted petitioner because he produced no "context" for Williams' remark. Pet. App. 31, 829 F. Supp. at 158; Pet. App. 18, 56 F.3d at 549. But, there may have been no context. Williams may have simply made the remark and then realized what he had said and immediately left. The circuit court then reasoned that this assumed absence of context meant that petitioner had fatally failed to show "nexus" between Williams's intent and action. *Id*. The circuit court thus managed to dismiss the "smoking gun" remark by faulting petitioner for not showing what may never have happened, and also by isolating its consideration of this remark from all the other evidence in the case.[7] The "nexus" requirement as

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[7] The circuit court never considered whether the evidence in its totality made out a prima facie case of direct or circumstantial evidence.

applied by the circuit court so seriously constricts consideration of the proof that practically a signed confession is required to show liability.

Of course there must be some reasonable connection between Williams's intent and his action to support the inference that the one caused the other. Causation must be shown; but it was amply shown on this record taking the evidence in the light most favorable to petitioner and not resolving any material issues of fact, as required by *Fed.R.Civ.P.* 56.[8] A reasonable jury could have found that Williams made his July remark at the office during business hours; that he abruptly left after confessing to an unlawful motive and being reprimanded by the Human Relations Manager, indicating a realization of having confessed to an unlawful motive; that he made the decision to terminate petitioner at about that same time; that he made a summer-long series of age-biased remarks; that petitioner was performing competently; that the geographic reassignment was done "to allow a more even distribution of the present volume" and not because of petitioner's performance; and that petitioner was more qualified than Finnell. "A fair-minded jury could return a verdict for the plaintiff on [this] evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

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[8] The circuit court resolved conflicts in the evidence as to two crucial issues of fact: why Williams reduced petitioner's territory in July, Pet. App. 14, and why Williams discharged Petitioner in August, Pet. App. 12. The court also reached these resolutions *without considering the pretext evidence* of Williams' summer long series of age-discriminatory remarks. The employer's rebuttal was folded into Petitioner's presumptive case, but Petitioner's evidence of pretext was omitted.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted, this 19 day of February, 1996.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES O'CONNOR, PETITIONER

v.

CONSOLIDATED COIN CATERERS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a plaintiff alleging that he was discharged in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, must show that he was replaced by someone outside the protected age group to make out a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) has primary responsibility for administering and enforcing the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* The EEOC participated as *amicus curiae* in this case in the court of appeals. In addition, the Attorney General and the EEOC share responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits discrimination in employment on the

basis of race, sex, religion, or national origin. In litigation under both the ADEA and Title VII, courts use the order of proof and prima facie case framework set forth by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the application of which is at issue in this case. The resolution of this case will affect the enforcement responsibilities of the Attorney General and the EEOC.

STATEMENT

1. From 1986 to 1990, petitioner was employed as general manager of respondent's "4Cs North" sales territory, covering northern North Carolina and southern Virginia. Pet. App. 3. Respondent operates cafeterias and vending machines. *Id.* at 2. In 1989, petitioner's immediate supervisor, Regional Vice President Ed Williams, gave him a performance rating of "commendable minus" (*i.e.*, slightly less than "commendable") and informed petitioner that he had earned the largest incentive bonus at the company that year. O'Connor Aff. ¶ 4.

Later in 1989, respondent reorganized its sales territories. Petitioner, who was then 55 years old, agreed to assume control of respondent's "4Cs South" territory, covering southern and western North Carolina and northern South Carolina, which had had financial problems. O'Connor Aff. ¶ 5; Pet. App. 3. Mike Kiser, who was 35 years old, took over petitioner's former position as manager of the 4Cs North area. Allen Hunter, age 57, remained the manager of the Greensboro/Raleigh, North Carolina, region, and Ted Finnell, age 40, remained in charge of the Greenville/Spartanburg, South Carolina, region. O'Connor Aff. ¶ 5; Pet. App. 3.

In the summer of 1990, Williams reassigned part of petitioner's 4Cs South territory to Mike Kiser, purportedly because petitioner was "slow" in responding to problem accounts. Pet. App. 3-4. At about the same time, Williams began making age-related remarks to and around petitioner. First, while watching a golf tournament on television in June, Williams commented to petitioner that petitioner was "too old" to play 18 holes of golf five days in a row. In July, during a discussion in petitioner's office, Williams told petitioner, "O'Connor, you are too damn old for this kind of work." Finally, in early August, in petitioner's presence but in response to another employee's comment that he would soon be turning 50 years old, Williams remarked, "It's about time we started to get some young blood in this company." *Id.* at 17-19.

Two days after the last comment, petitioner was terminated. All of his territory was combined with the territory assigned to the 40-year-old Finnell and placed under Finnell's control. (In Finnell's most recent appraisal, made eight months earlier, Williams had given him a "competent minus" performance rating, a lower rating than the "commendable minus" rating received by petitioner. O'Connor Aff. ¶ 10.) At the same time, the 57-year-old Hunter was demoted to a sales position, and all of his territory was combined with the territory assigned to the 35-year-old Kiser and placed under Kiser's management. Pet. App. 4-5.

2. Petitioner filed suit in the United States District Court for the Western District of North Carolina, alleging that he was fired because of his age, in violation of the ADEA. The district court granted summary judgment to respondent. Pet. App. 24-35. The court observed that an age discrimination plaintiff can prove a case of discrimination in at least

two ways: The plaintiff may rely on "direct or indirect evidence admissible under the rules of evidence" to demonstrate discrimination. *Id.* at 27. Alternatively, the plaintiff may rely on "the scheme of proof initially applied to Title VII 'disparate treatment' cases and known as the *McDonnell-Douglas* proof scheme. * * * This scheme of proof favors the plaintiff initially by allowing him to rather easily establish a presumption of discrimination that, once established, compels the defendant-employer to demonstrate a legitimate, non-discriminatory reason for the unfavorable employment decision." *Id.* at 27-28 (citing, *inter alia*, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973)).

The court concluded that petitioner had failed to demonstrate unlawful discrimination under either method of proof. It read Fourth Circuit precedent to require, under the *McDonnell Douglas* proof scheme, that petitioner prove "four objective elements":

> (1) he was in the protected age group class under the Act at the time of the unfavorable employment decision; (2) he was discharged; (3) at the time of his discharge, he was performing his job at a level that met his employer's legitimate expectations; and (4) following the discharge, he was replaced by someone of comparable or lesser qualifications outside the protected class.

Pet. App. 28. The court ruled that petitioner had failed to produce evidence of the fourth *McDonnell Douglas* element because his replacement, Finnell, was 40 years old, and was therefore within the class of persons protected by the ADEA. Therefore, it held,

petitioner "cannot rely on the *McDonnell-Douglas* proof scheme." *Id.* at 30.[1]

The district court also concluded that petitioner could not withstand summary judgment using "traditional principles of proof." Pet. App. 30. It decided that petitioner's direct evidence of discrimination, the three age-related remarks by Williams, was not probative because there was no direct "nexus" between the remarks and the discharge. *Id.* at 31. It further concluded that petitioner's "indirect," performance-related evidence, *viz.*, his bonus and his recent receipt of an appraisal superior to Finnell's, was also not probative because the appraisals had been made eight to nine months before petitioner's discharge. *Id.* at 33-34.

3. The court of appeals affirmed. Pet. App. 1-23. It concluded, as had the district court, that petitioner could not make out a prima facie case under *McDonnell Douglas* because his replacement was within the protected age group, albeit substantially younger than petitioner. *Id.* at 9-10. The court stated that "Fourth Circuit precedent has required a plain-

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[1] The district court also noted that, although the Fourth Circuit had indicated that the fourth *McDonnell Douglas* element "is not rigidly applicable" in cases involving a reduction in force, the court of appeals had stated that, "even in reduction in force cases, the employee must demonstrate that the employer 'did not treat age neutrally in its [employment decisions]' " to establish a prima facie case under *McDonnell Douglas*. Pet. App. 28 (citations omitted). The district court expressed doubt whether petitioner's discharge was the result of a reduction in force (*id.* at 29), but it ruled that, even if it was, petitioner could not prevail because he had presented "no other evidence that [respondent] did not treat age neutrally in deciding to terminate him" (*id.* at 30).

tiff to demonstrate that his replacement was outside the protected class to satisfy [the fourth *McDonnell Douglas*] element," although it acknowledged contrary authority in other circuits. *Id.* at 10 n.1.

The court believed that, because petitioner "can point to his replacement[,] * * * this case is not properly characterized as a reduction-in-force suit." Pet. App. 9. It nonetheless considered whether petitioner could make out a prima facie case under a "modified version of the *McDonnell Douglas*" scheme applicable to reductions in force, and decided that he could not. The court described the elements of the modified scheme as follows:

> (1) the employee was protected by the ADEA; (2) he was selected for discharge from a larger group ~~of candidates~~; (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force of persons in the group[] [retained] containing some unprotected persons who were performing at a level lower than that at which he was performing.

Pet. App. 11.

The court concluded that petitioner could not satisfy either the third or the fourth element of the modified scheme. As to the third element, it reasoned that, notwithstanding petitioner's favorable performance review in 1989, petitioner "was not performing well in August of 1990, at the time of his termination." Pet. App. 13. And as to the fourth prong, it ruled that petitioner could not show that "persons outside the protected class were retained in the same position *or* that there was some evidence indicating that the employer did not treat age neutrally." *Ibid.*

The court believed that petitioner was "not comparable to Kiser or Finnell since [petitioner's] territory was reduced prior to his termination due to his slow response to problem accounts." *Id.* at 13-14.

Finally, the court of appeals affirmed the district court's decision that petitioner had not produced probative direct evidence of discrimination. It found Williams's remarks to be "innocuous" (Pet. App. 17) and "inane" (*id.* at 19), amounting only to "stray comments that do not establish evidence of age discrimination" (*ibid.*). It also rejected petitioner's evidence based on differential performance reviews as "insufficiently probative," in light of its earlier conclusion that petitioner and Finnell were not similarly situated because petitioner's territory had been reduced. *Ibid.*

Judge Butzner filed an opinion concurring in part and dissenting in part. Pet. App. 20-23. He "reluctantly" agreed that circuit precedent required petitioner to show that he was replaced by someone outside the protected age group to satisfy the fourth element of the *McDonnell Douglas* prima facie case, although he stated that "[s]uch an absolute requirement has no justification in law or policy." *Id.* at 21. He believed, however, that petitioner had produced sufficient direct evidence of discrimination to survive summary judgment. *Id.* at 22-23.

SUMMARY OF ARGUMENT

The Fourth Circuit erred in concluding that, to establish a prima facie case of age discrimination under *McDonnell Douglas*, petitioner was required to demonstrate that his replacement was not within the class of persons protected by the ADEA. The ADEA prohibits age discrimination against "any individual"

age 40 or older, and that prohibition extends to age discrimination among individuals within the protected age group. If the statute did not bar age discrimination among persons within the protected age group, it would offer little protection to senior-level employees whose jobs require experience, for even an employer seeking to discriminate against older workers would rarely replace such employees with someone younger than 40.

In a discharge case under the ADEA, a plaintiff should be able to make out a prima facie case by showing that he was within the protected age group, that he was discharged from a position for which he was qualified, and that the employer sought or obtained a replacement with similar qualifications. That showing eliminates the two most common nondiscriminatory reasons for a discharge, lack of qualifications in the applicant and lack of available work. It therefore raises an inference of discrimination, even if the plaintiff does not identify the age of the replacement, by presenting the court with the unexplained termination of a qualified employee in the protected age group who performed a task for which the employer had a need. Such a showing therefore shifts to the employer the burden of articulating a legitimate, nondiscriminatory reason for the termination. A similar approach has been applied in cases arising under Title VII of the Civil Rights Act of 1964.

In cases involving reductions in force, where the employer no longer has a need for anyone to perform the discharged employee's functions, a plaintiff alleging age discrimination may have to show that the employer retained younger employees to establish a prima facie case. This is not a reduction-in-force

case, however, for petitioner has shown that respondent continued to have a need for someone to fulfill the functions that he was performing before he was fired. Furthermore, even in a reduction-in-force case, a plaintiff should have to show only that similarly qualified and younger employees were retained, not that employees younger than 40 were retained. Petitioner in this case has therefore established a prima facie case, and the district court should not have granted summary judgment to respondent.

ARGUMENT

I. IN A DISCRIMINATORY DISCHARGE SUIT BROUGHT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE AGE OF THE REPLACEMENT EMPLOYEE IS NOT AN ELEMENT OF THE PRIMA FACIE CASE UNDER THE *MCDONNELL DOUGLAS* FRAMEWORK

1. The Age Discrimination in Employment Act (ADEA) provides, in part:

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. 623(a)(1). A separate section of the ADEA further provides that "[t]he prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." 29 U.S.C. 631(a).

The protection against discrimination afforded by the ADEA is thus limited to individuals "who are at least 40 years of age." 29 U.S.C. 631(a). Nothing in

the ADEA suggests, however, that an employer may discriminate against an older employee in favor of a younger one merely because the younger one is 40 years old. It is "hornbook law" that an ADEA action may be based on discrimination between older and younger members of the protected class. *Kralman* v. *Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir.), cert. denied, 115 S. Ct. 359 (1994). Indeed, respondent does not dispute that an ADEA plaintiff may rely on "an intra-protected-group age comparison" to demonstrate unlawful age discrimination. See Resp. Br. in Opp. 9.

The legislative history of the ADEA plainly indicates that Congress intended to prohibit age discrimination even when the favored younger employee is 40 years old. During the Senate's consideration of the ADEA, Senator Javits made that very point:

> Section 4 of the bill specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 solely * * * because he is younger than the man 52, then he will have violated the act.

113 Cong. Rec. 31,255 (1967). Senator Yarborough, the floor manager of the bill, agreed:

> It is not the intent of the sponsors of this legislation * * * to permit discrimination on account of age, whether discrimination might be attempted between a man of 38 and one 52 years of age, or between one 42 and one 52 years of age. If two men applied for employment under the terms of this

> law, and one was 42 and one was 52, * * * [the employer] could not turn either down on the basis of the age factor.

Ibid.

Consistent with the language and legislative history of the statute, EEOC regulations bar discrimination within the protected age group. Under those regulations, "[i]t is unlawful * * * for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age." 29 C.F.R. 1625.2(a). Because the EEOC is the agency charged with implementation of the ADEA, its interpretation is entitled to "great deference." *Kralman*, 23 F.3d at 155 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)); see 29 U.S.C. 628 (EEOC's statutory authority to issue rules and regulations to implement ADEA).[2]

It would be inconsistent with the policy of the ADEA to exclude employees who suffer age discrimination from the ADEA's protective reach merely because those who benefit from the discrimination are also protected by the Act. As the Third Circuit has

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[2] The EEOC's statutory authority to issue regulations "necessary or appropriate for carrying out [the ADEA]," including regulations to establish "reasonable exemptions" from the ADEA (29 U.S.C. 628), distinguishes the ADEA from Title VII, for which the EEOC does not have "authority to promulgate rules and regulations." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (declining to accord deference to EEOC's Guideline on extraterritorial application of Title VII).

noted, "[i]f no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40." *Maxfield* v. *Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1985), cert. denied, 474 U.S. 1057 (1986). A rule limiting protection to those replaced by employees younger than 40 "fails to take the reality of the working place into account. Because of the value of experience, rarely are sixty-year-olds replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged." *McCorstin* v. *United States Steel Corp.*, 621 F.2d 749, 754 (5th Cir. 1980). Although an employer may rarely replace a 60-year-old with a 35-year-old, "the sixty-year-old will be replaced by a fifty-five-year-old, who, in turn, is succeeded by a person in the forties[.] * * * Eventually, a person outside the protected class will be elevated but rarely to the position of the one fired." *Ibid.*

2. a. The ADEA therefore unquestionably prohibits discrimination against individuals who are 40 years old or older, on the basis of age, even when that discrimination favors someone who is also 40 years old or older. This case presents the question whether the same conclusion applies to the establishment of a prima facie of age discrimination—whether an age discrimination plaintiff is precluded from establishing a prima facie case under the *McDonnell Douglas* framework simply because the beneficiary of the discrimination is 40 years old. In our view, the fact that the replacement worker is 40 years old or older

should not prevent a plaintiff from establishing such a prima facie case.[3]

The question presented in this case must be considered in light of the purpose of the burden-shifting framework articulated in *McDonnell Douglas*. The Court designed that framework as "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). Because plaintiffs rarely can demonstrate an employer's discriminatory intent directly, "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985)

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[3] See *McDonnell Douglas Corp.* v. *Green*, 411 U.S 792, 802 (1973) (setting out elements of prima facie case of discriminatory failure to hire under Title VII of Civil Rights Act of 1964). Although this Court has never decided whether the *McDonnell Douglas* framework applies to litigation under the ADEA, every court of appeals that has considered the issue has held that it does, and we are not aware of any contrary decision. *E.g.*, *Seman* v. *Coplay Cement Co.*, 26 F.3d 428, 432 & n.7 (3d Cir. 1994); *Lovelace* v. *Sherwin-Williams Co.*, 681 F.2d 230, 239 n.8 (4th Cir. 1982); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1012-1017 (1st Cir. 1979); *Schwager* v. *Sun Oil Co.*, 591 F.2d 58, 60-61 (10th Cir. 1979). Since Title VII and the ADEA share a common purpose—elimination of discrimination in the work place (see *McKennon* v. *Nashville Banner Pub. Co.*, 115 S. Ct 879, 884 (1995))—and since many of "the prohibitions of the ADEA were derived *in haec verba* from Title VII" (*Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)), it is especially appropriate to apply the *McDonnell Douglas* proof scheme to cases arising under the ADEA.

(quoting *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)).

McDonnell Douglas allows the plaintiff to establish a prima face case of discrimination "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's] qualifications." 411 U.S. at 802. That formulation of the prima facie case reflects the Court's recognition that "the two most common legitimate reasons on which an employer might rely to reject a job applicant" are "absolute or relative lack of qualifications [and] the absence of a vacancy in the job sought." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). The *McDonnell Douglas* formulation allows the plaintiff to show that those defenses are not at issue in the case by demonstrating that there was a position to be filled for which he was qualified. If the plaintiff makes that showing, then the unexplained failure to hire (or termination of) an applicant or employee who is qualified to perform a task that the employer needs to have done gives rise to an inference of unlawful discrimination.[4] As the Court in *Furnco* explained:

[4] "The prima facie case described in *McDonnell Douglas* did not include proof that some person outside the protected class was hired in complainant's place. Rather the prima facie case there described is based on the notion that, by ruling out the more obvious job-related reasons for not hiring him, a Title VII complainant can create an inference of some tainted reason, *i.e.*, some discriminatory reason, sufficient to require the employer to articulate a legitimate reason for the complainant's rejection." *Loeb*, 600 F.2d at 1013.

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

438 U.S. at 577 (citation omitted).

Establishment of a prima facie case under *McDonnell Douglas* does not compel a finding of discrimination; it merely shifts to the employer the burden of producing evidence of a non-discriminatory reason or reasons for the personnel action. "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee," *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981), and that presumption "places upon the defendant the burden of producing an explanation to rebut the prima facie case," *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2747 (1993). If the defendant meets its burden of production on rebuttal, then "[t]he presumption, having fulfilled its role of forcing the defendant

to come forward with some response, simply drops out of the picture" and "the trier of fact proceeds to decide the ultimate question: [w]hether plaintiff has proven 'that the defendant intentionally discriminated against [him.]'" *Id.* at 2749.

b. In the context of Title VII litigation, the prevailing view in the courts of appeals is that a plaintiff is not prevented from establishing a prima facie case by the fact that the person hired instead of the plaintiff or chosen to replace the plaintiff is a member of the same minority group as is the plaintiff, or has the same gender as the plaintiff.[5] This view permits a plaintiff who is a member of a minority group or a woman to establish a prima facie case, and thus to raise an inference that he or she was the victim of prohibited discriminatory treatment, even though another person of the same minority group or gender might have escaped such treatment by the same

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[5] See *Davenport* v. *Riverview Gardens School Dist.*, 30 F.3d 940, 944-945 (8th Cir. 1994); *Rush* v. *McDonald's Corp.*, 966 F.2d 1104, 1114 (7th Cir. 1992); *Jackson* v. *Richards Medical Co.*, 961 F.2d 575, 587 n.12 (6th Cir. 1992); *Cumpiano* v. *Banco Santander Puerto Rico*, 902 F.2d 148 (1st Cir. 1990); *Meiri* v. *Dacon*, 759 F.2d 989, 995-996 (2d Cir. 1985). There is language in other decisions suggesting that the characteristics of the replacement are part of the prima facie case, but in none of those decisions was the issue squarely presented. See *Korbin* v. *University of Minnesota*, 34 F.3d 698, 702 (8th Cir. 1994); *Notari* v. *Denver Water Dep't*, 971 F.2d 585, 590 (10th Cir. 1992); *Lee* v. *Russell Cty. Bd. of Educ.*, 684 F.2d 769, 775 n.11 (11th Cir. 1982). In *Hicks*, 113 S. Ct. at 2747, this Court noted that the respondent, a black man, had established a prima facie case by showing (among other things) that he was replaced by a white man, but the Court did not hold there that the race of the replacement was part of the prima facie case. See *id.* at 2758 n.1 (Souter, J., dissenting).

employer. As the Court stressed in *Connecticut* v. *Teal*, 457 U.S. 440, 455 (1982), "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. * * * Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired." See also *Teamsters* v. *United States*, 431 U.S. at 342.

The lower courts' conclusion that a plaintiff should not be precluded from establishing a prima facie case even when the hired employee is a member of the same minority group reflects a realistic view of the nature of discrimination in the workplace. There are some situations in which an employer might discriminate on the basis of (for example) race by refusing to hire a black person, even if another black person is ultimately hired for the same or a similar position. An employer engaging in racial discrimination might hire a few members of racial minority groups to ward off discrimination suits, or might reassign a few minority employees to conceal discrimination. Or an employer might discourage blacks from applying for certain positions through rejection of some black applicants and delay in filling the positions. Such actions would constitute prohibited discrimination, even if the persons eventually chosen to fill the positions were black.

The last fact pattern is, indeed, very similar to the facts of *Furnco*, in which three qualified black applicants for open bricklaying positions were initially rejected, but one of the three was subsequently hired, along with six other black bricklayers. 438 U.S. at 570. The Court agreed with the respondents

in that case that they had established a prima facie case under *McDonnell Douglas*: "[T]hey were members of a racial minority; they did everything within their power to apply for employment; Furnco has conceded that they were qualified in every respect for the jobs which were about to be open; they were not offered employment, although Smith later was; and the employer continued to seek persons of similar qualifications." *Id.* at 576.

c. These considerations apply with equal force to cases brought under the ADEA. As in the Title VII context, a correct understanding of the function of the *McDonnell Douglas* framework leads to the conclusion that the characteristics of the replacement employee are not an element of the plaintiff's prima facie case.[6] By establishing that he or she fell within the class of persons protected by the ADEA, had the qualifications for a position that the employer needed to fill, and nonetheless was rejected by the employer, an ADEA plaintiff presents the court with an unexplained adverse personnel action and raises an inference of discrimination. The age of the replacement employee may be relevant at a later stage of the

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[6] See *Freeman* v. *Packaging Machine Co.*, 865 F.2d 1331, 1335 n.1 (1st Cir. 1988); *Douglas* v. *Anderson*, 656 F.2d 528, 532 (9th Cir. 1981). See also *Alphin* v. *Sears, Roebuck & Co.*, 940 F.2d 1497, 1501 (11th Cir. 1991) (noting that plaintiff's evidence suggested that he was replaced by someone older "as part of a strategy to eliminate two employees from the protected group"); *Herold* v. *Hajoca Corp.*, 864 F.2d 317, 320 (4th Cir. 1988) (holding that prima facie case of age discrimination was established even though employer had assigned plaintiff's job duties to an even older worker), cert. denied, 490 U.S. 1107 (1989).

proceedings, but it should not affect the plaintiff's prima facie case.[7]

Moreover, the Fourth Circuit's rule, requiring a replacement from outside the protected class as a necessary element of a prima facie case in all cases, is wholly illogical. Under that rule, a 45-year-old plaintiff who was fired and replaced by a 39-year-old could establish a prima facie case, whereas a 65-year-old plaintiff replaced by a 40-year-old could not, even though the inference of age bias based on the difference in ages is much stronger in the second case than in the first. Every court of appeals other than the Fourth Circuit has therefore held that, at a minimum, a plaintiff should be able to make out a prima facie case under the ADEA if (in addition to the other elements of the *McDonnell Douglas* framework) he or she is replaced by a younger employee, irrespective of whether that replacement is older or younger than 40.[8]

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[7] The replacement of an employee in the protected age group with another employee at least 40 years old may be relevant to demonstrate the lack of discriminatory intent on the part of the employer. See *Hicks*, 113 S. Ct. at 2753-2754 (once the defendant satisfies its burden of production of a nondiscriminatory reason for its action, the presumption of discrimination disappears, and the trier of fact must then decide "whether the defendant intentionally discriminated against the plaintiff"); see also *Cumpiano* v. *Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990) (noting that "the attributes of a successor employee may have evidentiary force in a particular case").

[8] See *Cuddy* v. *Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982); *Freeman* v. *Package Machinery Co.*, 865 F.2d 1331, 1335 n.2 (1st Cir. 1988); *Haskell* v. *Kamen Corp.*, 743 F.2d 113, 119 n.1 (2d Cir. 1984); *Maxfield, supra*, 766 F.2d at 791-792 (3d Cir.); *Lindsey* v. *Prive Corp.*, 987 F.2d 324, 326-327 (5th Cir. 1993);

A rigid under-age-40 requirement not only lacks logic and common sense, it would run counter to the Court's admonitions that the *McDonnell Douglas* framework is not "rigid, mechanized or ritualistic" (*Furnco*, 438 U.S. at 577; *Burdine*, 450 U.S. at 253 n.6), and that the burden of establishing a prima facie case is "not onerous" (*id.* at 255). A "Procrustean limitation" restricting the ability to establish a prima facie case to situations in which the replacement is younger than 40 would preclude many older, more experienced employees with meritorious claims from relying on the *McDonnell Douglas* framework, simp-

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Barnes v. *GenCorp, Inc.*, 896 F.2d 1457, 1465 n.9 (6th Cir.), cert. denied, 498 U.S. 878 (1990); *Kralman, supra*, 23 F.3d at 153-156 (7th Cir.); *Rinehart* v. *City of Independence*, 35 F.3d 1263, 1265-1266 (8th Cir. 1994), cert. denied, 115 S. Ct. 1822 (1995); *Douglas* v. *Anderson*, 656 F.2d 528, 532-533 (9th Cir. 1981); *Cooper* v. *Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988); *Corbin* v. *Southland Int'l Trucks*, 25 F.3d 1545, 1549 (11th Cir. 1994). But see *LaPointe* v. *United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (seemingly requiring replacement from outside the protected class); *Price* v. *Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir. 1977) (same). The Fourth Circuit's adoption of the "under-age-40" requirement may have been inadvertent. That court first stated that a replacement from outside the protected class was required in *EEOC* v. *Western Electric Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983), where it cited *Lovelace* v. *Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982), for its formulation of the prima facie case. *Lovelace* in fact rejected an under-age-40 requirement. See *id.* at 237-238 n.5, 242 n.13. The *Western Electric* court also cited *Marshall* v. *Goodyear Tire & Rubber Co.*, 554 F.2d 730 (5th Cir. 1977), but that decision held only that a prima facie case was established when the plaintiff was replaced by someone outside the protected group (*id.* at 736); it did not hold that replacement by one younger than 40 was essential.

ly because their replacement was age 40 or 41 (rather than 38 or 39), even though that fact alone does not remove the inference of discrimination. See *McCorstin*, 621 F.2d at 753. There is simply "no reason to engraft [an under-age-40] requirement on to the law." *Maxfield*, 766 F.2d at 792.[9]

It also bears emphasis that, whereas the burden of establishing a prima facie case under *McDonnell Douglas* is not heavy, the employer's burden of production in rebuttal to that prima facie case is also light, for at the rebuttal stage, the defendant "need not persuade the court that it was actually motivated by the proffered reasons." *Hicks*, 113 S. Ct. at 2749. The defendant need only "'set forth, through the introduction of admissible evidence,' reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Id.* at 2747 (emphasis omitted). When combined with the evidence produced to establish plaintiff's prima facie case, the employer's proffered reasons for the adverse personnel action and the identity of the replacement employee will "frame the factual issue with sufficient

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[9] The inappropriateness of the Fourth Circuit's requirement is apparent from the facts of this case. Because Hunter's district was assigned to Kiser (age 35), Hunter (age 57) would be able to establish a prima facie case of discrimination based on his demotion, whereas petitioner (age 55), although fired on the same day during the same reorganization, cannot because his replacement was age 40—even though the age difference between the displaced and retained employees is similar in both instances. Petitioner could, however, have established a prima facie case if the reorganization had occurred the previous year, before Finnell turned 40, or if his district had gone to Kiser instead of to Finnell.

clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext," *Burdine*, 450 U.S. at 255-256, and the trier of fact can make an informed credibility determination. The Fourth Circuit's rule, on the other hand, would arbitrarily preclude any use of the *McDonnell Douglas* framework in ADEA cases simply because the hired or retained employee is at least 40 years old.

II. SPECIAL CONSIDERATIONS THAT MAY BE APPLICABLE TO CASES INVOLVING REDUCTIONS IN FORCE DO NOT APPLY TO THIS CASE

In several cases, lower courts have struggled with the application of the *McDonnell Douglas* proof scheme to employers' large-scale reductions in force, such as reductions caused by plant closings.[10] The difficulty in applying *McDonnell Douglas* to reductions in force stems from the fact that, when the workforce is reduced, the employer has often determined for wholly nondiscriminatory reasons that it no longer has an economic need for the functions that

[10] See, *e.g.*, *Roper* v. *Peabody Coal Co.*, 47 F.3d 925, 927 (7th Cir. 1995) (ADEA); *Bashara* v. *Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994) (ADEA); *Mitchell* v. *Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (ADEA); *Bell* v. *AT&T*, 946 F.2d 1507, 1590-1511 (10th Cir. 1991) (Title VII); *Williams* v. *Williams Electronics, Inc.*, 856 F.2d 920, 922-923 (7th Cir. 1988) (Title VII); *Oxman* v. *WLS-TV*, 846 F.2d 448, 453-456 (7th Cir. 1988) (ADEA); *Simpson* v. *Midland-Ross Corp.*, 823 F.2d 937, 941 (6th Cir. 1987) (ADEA); *Shah* v. *General Elec. Co.*, 816 F.2d 264, 267-271 (6th Cir. 1987) (Title VII); *Matthews* v. *Allis-Chalmers Corp.*, 769 F.2d 1215, 1217 (7th Cir. 1985), overruled in part by *Oxman*, *supra*; *id.* at 1221-1224 (Flaum, J., concurring) (ADEA); *Western Electric*, 713 F.2d at 1014-1015 (ADEA); *Williams* v. *General Motors Corp.*, 656 F.2d 120, 129-131 (5th Cir. 1981) (ADEA), cert. denied, 455 U.S. 943 (1982).

the plaintiff was performing.[11] In such cases, it cannot be said, in the language of *McDonnell Douglas*, that, after the plaintiff's discharge, "the position remained open and the employer continued to seek applicants from persons of [the plaintiff's] qualifications." 411 U.S. at 802. When a position has been eliminated for economic reasons, it is possible to conclude that "the fact that a protected employee who was performing his job well was fired cannot, by itself, trigger a presumption of discrimination." *Oxman* v. *WLS-TV*, 846 F.2d 448, 454 (7th Cir. 1988).

Consequently, some courts have concluded that, in cases involving reductions in force, plaintiffs should be required to produce some other evidence, "circumstantial or direct, from which a factfinder might conclude that the employer intended to discriminate in reaching the decision at issue," in order to establish a prima facie case.[12] In many cases, that requirement will effectively mean that the plaintiff must show how other employees were treated by the employer during the reduction of the workforce. The plaintiff might, for example, raise an inference of discrimination by producing evidence that the employer laid off qualified black, female, or older

[11] Thus, in such cases, "the employer's reason for discharging the plaintiff is not 'otherwise unexplained.' The reduction-in-force is [itself] an objective, legitimate explanation of the employer's action which the plaintiff does not call into question by establishing a prima facie case under the regular standards." *Rinehart*, 35 F.3d at 1268.

[12] *Williams* v. *General Motors Corp.*, 656 F.2d at 129; see also *Oxman*, 846 F.2d at 454 ("an additional showing that creates an inference of discrimination"); *Western Electric*, 713 F.2d at 1015 ("some other evidence that the employer did not treat age neutrally").

employees but retained similarly qualified white, male, or younger ones. See, *e.g.*, *Shah* v. *General Elec. Co.*, 816 F.2d 264, 268-269 (6th Cir. 1987).

Those considerations do not apply here, since, as the court of appeals observed (Pet. App. 9-10), this case does not involve a reduction in force. Although respondent eliminated a few positions from its workforce, it did not cease to have a need for someone to perform the managerial functions that petitioner had been assigned. "Thus, the 'jobs' were consolidated but the task remained the same; each individual [employee] merely had to work harder to perform that same task." *Shah*, 816 F.2d at 269. The reason given for modifying the *McDonnell Douglas* formulation in reduction-in-force cases is therefore absent here, and the situation is more accurately analyzed as one in which Finnell replaced petitioner, or one in which both Finnell and petitioner were considered for a new position for which both were qualified.

Even if considerations applicable to reduction-in-force cases were pertinent here, petitioner should not be precluded from making a prima facie case merely because Finnell, his replacement, was age 40. The differential treatment between petitioner and the much younger Finnell is sufficient to raise an inference of age discrimination, even if Finnell's age is deemed relevant to the existence of a prima facie case. See *Roper* v. *Peabody Coal Co.*, 47 F.3d 925, 927 (7th Cir. 1995). Although petitioner might not be able to make out a prima facie case of age discrimination if all of the retained comparable employees were the same age as he or older, that is not the situation in this case, in which the favored employee was substantially *younger* than petitioner. Petitioner therefore established a prima facie case of age discrimination, and

the district court should not have granted summary judgment to respondent.[13]

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[13] Moreover, if this were a reduction-in-force case, it would be appropriate to compare petitioner with Kiser, who was performing a similar function, who was retained, and who was younger than 40. That comparison would establish a prima facie case under any formulation of *McDonnell Douglas* applicable to reductions in force, for petitioner "was dismissed while younger workers, at least one of whom was under 40 and was therefore outside the ADEA-protected class, were retained." *Herold*, 864 F.2d at 320.

The court of appeals did not hold that petitioner was precluded from establishing a prima facie case under standards applicable to reductions in force solely because Finnell was age 40. The court of appeals stated that petitioner had not made out a prima facie case because he had not shown that "he was working up to expectations" (Pet. App. 13) and because Williams's decision to retain Kiser and Finnell, rather than petitioner, was based on "Kiser and Finnell's ability to handle an enlarged geographic territory" (*id.* at 14). We believe that both bases for the court of appeals' conclusion are erroneous. The factors discussed by the court of appeals are relevant in considering whether respondent rebutted petitioner's showing, not whether petitioner established a prima facie case. Petitioner's evidence of his performance review and bonus was sufficient to establish that he was qualified, for the purpose of making out a prima facie case. Neither court below evaluated the strength of respondent's rebuttal case, however, since both courts incorrectly ruled that petitioner had failed to establish a prima facie case.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAMES O'CONNOR,

Petitioner,

v.

CONSOLIDATED COIN CATERERS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a *prima facie* case of age discrimination precluded by the fact that the employee who secures the job that the claimant was denied is within the class of persons protected against age discrimination?

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IN THE

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---

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

INTERESTS OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose.

More than one-third of AARP's thirty-two million members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, (ADEA).

One of AARP's primary objectives is to strive to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and retain older workers, and to help older workers overcome the obstacles they face because of age.

AARP seeks to insure that older persons are judged on their ability, not age. To this end, AARP created a Worker Equity Initiative in 1985 to study and address issues affecting the employment of older persons. AARP has developed educational and advocacy programs to encourage and promote the employment of older persons. As part of its advocacy efforts, AARP has filed more than 100 *amicus curiae* briefs in the United States Supreme Court, federal appellate and district courts, and state courts regarding the proper interpretation and application of the federal and state discrimination laws to insure that the rights of older workers are fully protected.

The National Employment Lawyers Association (NELA) is a national bar association of over 2,000 lawyers who regularly represent employees in employment-related disputes. NELA members comprise a large segment of the leaders of the bar specializing in employment law on behalf of employees. NELA members regularly handle age discrimination cases.

In light of its interest in the application of employment law, NELA has previously filed *amicus curiae* briefs with the United States Supreme Court, as well as the federal Circuit Courts of Appeals, and various state Supreme Courts.

Because of its practical experience with the issues at bar, NELA is well-suited to brief this Court on the importance of the issues and the practical effects of the Court's decision beyond the immediate concerns of the parties.

Both *amici* are vitally interested the proper formulation and application of the requirements for a *prima facie* case of age discrimination.

SUMMARY OF ARGUMENT

In the typical employment discrimination suit, the plaintiff is able to present circumstantial, but not direct evidence of discrimination. In the absence of direct evidence, the *prima facie* case functions as a framework for establishing a rebuttable presumption of discrimination, thus compelling a response from defendant.

Because no single formulation of the *prima facie* showing can possibly be expected to capture the many guises in which such discrimination can occur, and because plaintiff's burden is light, this Court has repeatedly emphasized that one acceptable framework, its *McDonnell Douglas* model, is, of necessity, a flexible test, adaptable to different factual situations. Ignoring this principle, the court below rigidly applied an adaptation of *McDonnell Douglas* for ADEA discharge cases that requires as its fourth element a showing that the discharged employee was replaced by someone outside the protected age group. The court held that because

the 56 year old petitioner's replacement was 40 years old, just within the age group protected by the ADEA, petitioner could not, as a matter of law, make the required *prima facie* showing and granted summary judgment for defendant.

Finding that petitioner's evidence failed to satisfy even its relaxed *prima facie* standard applicable to reduction-in-force cases, the court below improperly relied on evidence relevant to respondent's rebuttal, while essentially ignoring the probative value of plaintiff's circumstantial evidence. Finally, because of its too rigid adherence to the formulaic approach, the court below essentially ignored petitioner's direct evidence of discriminatory intent.

ARGUMENT

I. REPLACEMENT BY A MEMBER OF THE PROTECTED CLASS IS NOT AN ESSENTIAL ELEMENT OF A *PRIMA FACIE* CASE OF AGE DISCRIMINATION UNDER THE *MCDONNELL DOUGLAS* PROOF PARADIGM.

A. Purpose Of The *Prima Facie* Case.

Since in the typical employment discrimination case direct evidence may be unobtainable, this Court developed the *McDonnell Douglas prima facie* framework for evaluation of the available circumstantial evidence. The *prima facie* case

> is based on the notion that, by ruling out the more obvious job-related reasons for [the employer's decision, an employment discrimination] complainant can create an inference of some tainted reason, *i.e.*, some discriminatory reason, sufficient to require the employer to articulate a legitimate reason for [the employment decision.]"

Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979). It is, therefore, the first step in "sharpen[ing] the inquiry into the elusive factual question of intentional discrimination." *Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 8. (1981).

In an ADEA case alleging discriminatory discharge, plaintiff's ultimate burden is to prove by a preponderance of the evidence that age was a motivating factor in the employer's decision to discharge him. *Hazen Paper Co. v. Biggins*, ___ U.S. ___, 113 S. Ct. 1701, 1706 (1993). Plaintiff's proof may consist of direct or circumstantial evidence. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3 (1981). Direct evidence is not required because "it is often unavailable or difficult to find." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). "Employers are rarely so cooperative as to include a notation in the personnel file, `fired due to age'; or to inform a dismissed employee candidly that he is too old for the job." *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 638 (5th Cir. 1985). Therefore, most employment discrimination plaintiffs must rely on circumstantial evidence because direct evidence is unobtainable. "Even an employer who knowingly discriminates on the basis of age may leave no written records and may communicate it orally to no one." *LaMontagne v. American Convenience Products, Inc.*, 750 f.2d 1405, 1410 (7th Cir. 1984).Because "[t]here will seldom be `eyewitness' testimony as to the employer's mental

process," this Court in *McDonnell Douglas v. Green*[1/] "devised a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence." *Aikens*, 460 U.S. at 716.

The court below acknowledged that in accordance with its decision in *EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992), an ADEA plaintiff "may meet this burden under the ordinary standards of proof by direct or indirect evidence relevant to and sufficiently probative of the issue." In the alternative, an ADEA plaintiff may, as O'Connor did, "resort to the proof scheme articulated for Title VII cases in *McDonnell Douglas v. Green*,"[2/] "- properly adapted - for application to ADEA litigation." *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982.

In *McDonnell Douglas*, this Court specified "the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment."[3/] In a unanimous opinion by Mr. Justice Powell, the Court in *McDonnell Douglas* held that plaintiff bears the burden of establishing a *prima facie* case of discrimination and that "[t]his *may*" - not *must* - "be done" by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the

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1/ 411 U.S. 792 (1973).

2/ *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 545 (4th Cir. 1995).

3/ *Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

> employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[4/]

In *Loeb*, 600 F.2d at 1014, the First Circuit explained that *McDonnell Douglas*

> addresses two problems that exist in most employment discrimination cases: (1) direct evidence of discrimination is likely to be unavailable, and (2) the employer has the best access to the reasons that prompted him to fire, reject, discipline or refuse to promote the complainant.... Proof of the *McDonnell Douglas*-type prima facie case assures the plaintiff his day in court despite the unavailability of direct evidence, and entitles him to an explanation from the defendant-employer for whatever action was taken.

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. Neither is the burden cast on defendant once plaintiff makes the required showing. If proven, the *prima facie* case does not establish the fact of a discriminatory motive requiring a directed verdict for plaintiff; rather, it establishes a rebuttable factual presumption of discrimination which requires the defendant to produce some admissible evidence of (but not to prove by a preponderance) a legitimate, nondiscriminatory reason for plaintiff's termination. *Id.*, at 254. *McDonnell*

4/ 411 U.S. at 802 [emphasis supplied].

Douglas "does not alter the traditional burdens of proof in civil litigation, and is not intended to deflect the factfinder from the central issue of whether the employer was motivated by discriminatory factors." *Loeb*, 600 F.2d at 1015. Plaintiff's *prima facie* showing places upon the defendant merely "the burden of producing an explanation to rebut the prima facie case ...." *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742, 2747 (1993).

The issue raised by this case is whether the particular adaptation of *McDonnell Douglas* applied by the Fourth Circuit to the circumstances of this case comports with the purpose of the *prima facie* case, which is "to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n. 8.

B. The Lower Court's Adaptation Of The Fourth *McDonnell Douglas* Element To Require Proof In An ADEA Discharge Case That Plaintiff's Replacement Is Outside The Protected Age Group Vitiates The Purpose Of The *Prima Facie* Case.

The insistence by the court below that where the plaintiff alleges that he was discharged due to age[5/] the fourth element

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5/ Although this Court has not had occasion to hold that *McDonnell Douglas* applies to suits under the ADEA, because every circuit court of appeals has so held, the Court has acknowledged that the *McDonnell Douglas* "framework has gained wide acceptance, not only in [Title VII cases], but also in similar cases, such as those alleging age discrimination under the Age Discrimination in Employment Act of 1967." *Hicks*, 113 S. Ct. at 2757 (Souter, J., dissenting). *See also Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985). *See, e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) (Nothing in the ADEA or its legislative history contradicts the conclusion that the same methods and burdens of proof apply under the ADEA as under Title VII.).

of the *prima facie* case can be satisfied only by a showing that plaintiff was replaced by someone outside the protected age group thwarts the purpose of the *McDonnell Douglas* paradigm.

The *prima facie* case requires that plaintiff make only a threshold showing of discriminatory treatment. Therefore, he "should not be forced to anticipate every possible reason his employer could provide for his discharge and incorporate responses to all of these hypothetical reasons into his prima facie case." *Gadsby v. Norwalk Furniture Corp.*, 1995 U.S. App. LEXIS 35229 (7th Cir. 1995), at 31 (Flaum, Circuit Judge, concurring).[6/] For example, in many discharges, the terminated older employee is not immediately replaced or is

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6/ *Gadsby* and the present case, among others, illustrate the struggle of the lower courts to adapt the fourth element of the *McDonnell Douglas* proof scheme to the ADEA because of the varying contexts in which age discrimination arises. [Age "[d]iscrimination, unfortunately, exists in forms as myriad as the creative perverseness of human beings can provide." *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753 (5th Cir. 1980)]. In *Gadsby*, a single discharge case where plaintiff was not replaced, the court sidestepped the more fundamental question of whether proof of actual replacement is required at all, but "declined to hold that the [less stringent] RIF standard applies." 1995 U.S. App. LEXIS 35229, at 21. In *O'Connor*, the court below felt constrained to apply its age 40 replacement test (which assumes a showing of replacement is required to satisfy the fourth element) and, like *Gadsby*, declined to apply its similar, less stringent reduction-in-force test, finding petitioner's evidence would be insufficient to meet even that relaxed standard. As discussed, herein, however, petitioner's evidence is much stronger and much more probative of age discrimination than was Gadsby's.

not replaced at all.[7] Thus, the characteristics of the replacement will have no bearing on the employer's discriminatory intent to discharge the older employee at the time of the discharge. Indeed, this Court's *McDonnell Douglas* formulation of the plaintiff's *prima facie* case does not require the plaintiff to show anything about the actual person hired or that the hiree was outside the protected class.

The *prima facie* case properly must focus on the treatment of the plaintiff at the time of the challenged employment decision. As this Court emphasized in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989): "The critical inquiry, the one commanded by the words of [the federal antidiscrimination statute], is whether an [unlawful criterion] was a factor in the employment decision *at the moment it was made*." The Court explained that "in saying that [an unlawful criterion] played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a [member of a protected group]." *Price Waterhouse*, 490 U.S. at 246, n. 11.

In other words, the *prima facie* case is a snapshot of the employee's treatment taken at the time of discharge. There may be other interpretations and explanations of the picture it presents, but such evidence is relevant to the employer's

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[7] As discussed in section I.C. below, the Fourth Circuit has held previously that even in a case involving the demotion and *immediate* replacement of a protected-age store manager, the age of the replacement is not an essential element of an ADEA claim. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 237-38 n. 5 (4th Cir. 1982).

rebuttal and, ultimately, to the plaintiff's proof of pretext, not to the *prima facie* case.

C. The Fourth Element Of The *Prima Facie* Case Must Be Flexible.

This Court has repeatedly emphasized that its decision in *McDonnell Douglas* "did not purport to create an inflexible formulation," *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 575 (1978) ("This, of course, was not intended to be an inflexible rule.") In the *McDonnell Douglas* opinion, immediately after setting forth the elements of the *prima facie* case applicable to the facts before the Court, Justice Powell added the caveat that

> The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.[8]

In *Furnco*, 438 U.S. at 577, this Court further cautioned that the *McDonnell Douglas prima facie* case must not be employed in a "rigid, mechanized, or ritualistic" manner because it is

> merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if

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[8] *McDonnell Douglas v. Green*, 411 U.S. 792, 802 n. 13 (1973).

> otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

Neither did the Court intend that *McDonnell Douglas* would be the exclusive method of establishing a *prima facie* case of individual discrimination. *Teamsters*, 431 U.S. at 358. Thus:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any [employment discrimination] plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Id.

The Fourth Circuit has acknowledged that "[i]t was never intended that a `prima facie case' of employment discrimination could be established only by mechanically applying the precise requirements set forth in *McDonnell Douglas*." *EEOC v. Western Elec. Co., Inc.*, 713 F.2d 1011, 1014 (4th Cir. 1983). Rather,

> because of the comparable remedial purposes of [Title VII and the ADEA] and the comparable difficulty under both of proving discriminatory motivation, the judicially created proof scheme for Title VII cases featuring a rebuttable factual presumption favoring claimants in the initial stages of proof is appropriate - *properly adapted* - for application in ADEA litigation.

Lovelace, 681 F.2d at 239 [emphasis supplied].

The Fourth Circuit's restrictive adaptation of the *McDonnell Douglas* paradigm for the "usual ADEA case," *EEOC v. Western Elec. Co., Inc.*, 713 F.2d at 1014, in which the fourth element mandates "replace[ment] by someone of comparable qualifications outside the protected class"[9/] supposedly "was intended to demonstrate unequal treatment by the relatively objective evidence of replacement by a member of a non-protected class." *Id.*, at 1014-15. However, the court below has transmuted that simple intention into mechanistic application of a method of proof which confines plaintiffs in discharge cases to a straitjacket[10/] and which vitiates the purpose of the *prima facie* case - to insure that victims of discrimination have their day in court. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

9/ As discussed above, Justice Powell's formulation of the elements of the *prima facie* case in *McDonnell-Douglas* did not include a showing of replacement by a person outside the protected class. 411 U.S. at 802.

10/ The parties and the district court characterized the facts as presenting a reduction-in-force case, *O'Connor*, 56 F.3d at 546. Nevertheless, the court below, struggling to fit the somewhat awkward facts of this case into a familiar formulation for analysis, found that because the reduced "force" in this case consisted of two people - plaintiff and one other employee - and because plaintiff could point to his replacement - the less stringent reduction-in-force paradigm was "inapt." Therefore, the court felt constrained to employ the more restrictive discharge/replacement rubric. *O'Connor*, 56 F.3d at 546. However, the elements of the *prima facie* case which plaintiffs must prove should not depend on a court's *post hoc* characterization of the facts to fit a particular model; rather, the *prima facie* model should be flexible enough to accommodate the facts themselves.

In *Lovelace*, an ADEA case arising from the demotion of a protected-age store manager and his replacement by a younger man who was also in the protected age group, the Fourth Circuit took a position completely opposite from that espoused in the opinion below. The *Lovelace* court stated that

> an ADEA claim involving replacement by another *does not require as a matter of law proof that the other was outside the protected age group*. But absolute and relative ages of the claimant and his replacement have obvious relevance in assessing whether a factual inference of age discrimination is permissible.

Lovelace, 681 F.2d at 242 n. 13 [emphasis supplied]. Going a step further, the Fourth Circuit in *Lovelace*, 681 F.2d at 237-8 n. 5, "agree[d]" that replacement "by a person outside the protected age group . . . is not [even] an essential legal element of the ADEA claim. . . ." The *Lovelace* court specifically pointed out, 681 F.2d at 242-3 n. 13, its agreement with the analysis of the First Circuit in *Loeb*, 600 F.2d at 1013 n. 9:

> Replacement of a 60 year old by a 35 year old or even a 45 year old within the protected class would be more suggestive of discrimination than replacement of a 45 year old by a 42 year old within the protected class or a 39 year old outside it.

Lovelace, 681 F.2d at 242-43 n. 13.

In the opinion below, without overruling *Lovelace* or even attempting to rationalize the conflict between its present decision and its above-described earlier analysis of the fourth

prima facie element, the court incorrectly stated that "Fourth Circuit precedent has required a plaintiff to demonstrate that his replacement was outside the protected class to satisfy that element," 56 F.3d at 546 n. 1, citing its decision in *EEOC v. Clay Printing Co.*, 955 F.2d 936, 943 (4th Cir. 1992). *Clay*, however, was a reduction-in-force case which applied the much less restrictive test of *Herold v. Hajoca Corp.*,[11/] "that persons outside the protected class were retained in the same position or that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss the plaintiff." Even *EEOC v. Western Elec. Co., Inc.*, 713 F.2d 1011 (4th Cir. 1983), in which the Fourth Circuit announced the rule applied below, was a reduction-in-force case to which the rule did not apply.

Thus, despite the Fourth Circuit's protestations that its decision was circumscribed by its own precedents, *O'Connor* is the first case to which that court has applied its unduly restrictive formulation of the fourth element to deny an ADEA discharge plaintiff a trial by jury.[12/]

[11/] 864 F.2d 317, 320 (4th Cir.), *cert. denied*, 490 U.S. 1107 (1988).

[12/] However, because "the age of a replacement employee should be a relevant, but not dispositive, factor for a court to consider when deciding whether the plaintiff has established a *prima facie* case under the *McDonnell Douglas* framework," the majority of the circuit courts have rejected the "absolute requirement" of showing replacement from outside the protected age group in favor of a showing that the replacement was merely younger. *O'Connor*, 56 F.3d at 550-51 (Butzner, Senior Circuit Judge, concurring in part and dissenting in part.).

II. TO REQUIRE ADEA DISCHARGE PLAINTIFFS TO SHOW A REPLACEMENT OUTSIDE THE PROTECTED CLASS IS CONTRARY TO THE STATUTORY PURPOSE OF THE ADEA.

A. In Enacting The ADEA, Congress' Purpose Was To Prohibit Employers From Using Age As A Determining Factor In Employment Decisions.

The purposes of the ADEA are set forth in the first section of the Act:

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C.. § 621(b). The statutory language adopted by Congress to implement this purpose is that work place discrimination against "any individual...because of such individual's age" is unlawful. 29 U.S.C. § 623. The statute says nothing about the age of others. Rather, in the circumstances of this case, it commands an examination of the employer's actions in order to determine if the individual employee's age was a motivating factor in the decision to discharge him.

Although the text of the ADEA does not address the narrow question presented by this case, the legislative history of the Act speaks to it directly and forcefully. Senator Javits, one of the sponsors of the ADEA, stated:

> Section 4 of the Bill [29 U.S.C. § 623] specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 . . . because he is younger than the man 52, then he will have violated the act . . . .

113 Cong. Rec. 31,255 (1967). Thus, it is clear that Congress intended to include within the coverage of the ADEA claims based on the relative ages of members of the protected class. "[T]he ADEA protects older employees from discrimination on the basis of age, not just discrimination in favor of persons under the age of forty." *Roper v. Peabody Coal Co.*, 47 F.3d 925, 927 (7th Cir. 1995).

A regulation promulgated by the Equal Employment Opportunity Commission expressly states that:

> It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such a decision on the basis of some other factor.

29 C.F.R. § 1625.2(a). Because the EEOC is the primary agency charged with implementing the ADEA, its interpretation is entitled to great deference. *Chevron, U.S.A.,*

Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

There is not a scintilla of evidence in either the statute or its legislative history evincing an intention that an employer should be "insulated from liability for age discrimination when he chooses among people in the protected class." *Mayall v. Peabody Coal Co.*, 7 F.3d 570, 572 (7th Cir. 1993); *see Kralman v. Illinois Dept. of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994). The *O'Connor* decision, however, subverts the congressional purpose by turning the ADEA's shield against age discrimination for *every* older worker into a sword in the hands of employers to be used against *many* older workers who are discharged because of their age, through the simple artifice of hiring a replacement who is at least age 40.

B. Requiring Plaintiffs To Prove Replacement By Someone Under Age 40 Essentially Eviscerates The Law's Protections For Workers In The Upper Ages Of The Protected Class.

The practical consequences of dismissing age discrimination claims when a replacement is within the protected class cannot be ignored. "If no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40." *Maxfield v. Sinclair Intern.*, 766 F.2d 788, 792 (3d Cir. 1985) Moreover, "a requirement that the replacement be from a nonprotected group fails to take the

reality of the working place into account." *Carter v. City of Miami*, 870 F.2d 578, 583 (11th Cir. 1989). That reality is:

> Seldom will a sixty-year-old be replaced by a person in the twenties. Rather the sixty-year-old will be replaced by a fifty-five-year-old, who, in turn, is succeeded by a person in the forties, who will be replaced by a younger person. Eventually a person outside the class will be elevated but rarely to the position of the one fired. This is especially true in management and technical fields where knowledge and experience, the product of years, are necessary prerequisites to appointment of persons on high rungs of the corporate ladder.

McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980).

In the work place, the most common type of age discrimination claim is one brought by a 57-year old who is terminated.[13] Indeed, more than seventy-five percent of all age discrimination claims are discharge claims.[14] The requirement of showing replacement by one outside the protected class would, therefore, effectively deny a remedy to those most frequently victimized by age discrimination. Further, as the population continues to age, the need to

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[13] Schuster and Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 Indus. & Lab. Rev. 64 (Oct. 1984).

[14] O'Meara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act*, Labor Relations and Public Policy Series, at 26 (1989).

protect those older workers who elect to remain in the work force longer will only increase.

Although age is a "continuum along which the distinctions between employees are often subtle and relative," *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1442 (11th Cir.), *cert denied*, 474 U.S. 1005 (1983), age, like race or gender, is an immutable and discreet characteristic in the sense that once a person attains the status of "older worker," that status is permanent. Moreover, the discharge of an employee because of his age is just as injurious to the older worker as the discharge of an African-American because of his race or of a woman on account of her sex. "That the person is replaced by a person ten years younger rather than twenty years does not diminish the discrimination; the subtlety only tends to disguise it." *McCorstin*, 621 F.2d at 754.

Further, replacement, even by an older employee, should not necessarily foreclose proof of a *prima facie* case, especially if as in this case, there is other direct or circumstantial evidence which supports an inference of discrimination. *Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981); *see Jackson v. GTE Directories Service Corp.*, 734 F. Supp. 258, 267 (N.D. Tex. 1990). The older replacement could have been hired, for example, to deliberately mask discrimination in order to ward off a lawsuit. *See Loeb*, 600 F.2d at 1013 n. 9; *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir. 1982) (The fact that plaintiff "was replaced by a black does not necessarily negate the possibility that his treatment and discharge were motivated by racial discrimination.").

The civil rights laws protect the right of the individual employee to be free of invidious employment discrimination. These statutes do not permit employers to compromise this individual right by the non-discriminatory treatment of other employees in the protected class. *Connecticut v. Teal*, 457 U.S. 440 (1982). In the case of the ADEA, "Congress never intended favorable treatment of some members of a plaintiffs' age group to excuse discrimination against others." *Airline Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 953 (2d Cir. 1983), *aff'd on other grounds sub. nom. Trans World Airlines, Inc. v. Thurston*, 474 U.S. 946 (1985). Thus, the employer's replacement of a terminated 56 year old employee with another employee who is 40 years old, as the Fourth Circuit found was done in this case, does not preclude the possibility that the termination of the 56 year old was based on age. The Fourth Circuit's contrary holding smacks of the "bottom line" analysis emphatically rejected by this Court in *Teal*, 457 U.S. at 454.

III. BECAUSE OF ITS INSISTENCE ON THE MECHANISTIC APPLICATION OF ITS VERSION OF THE *MCDONNELL DOUGLAS* MODEL, THE COURT BELOW IMPROPERLY REJECTED PROBATIVE EVIDENCE SUFFICIENT TO ESTABLISH A *PRIMA FACIE* CASE

After finding that petitioner failed to satisfy the fourth element of its adaptation of *McDonnell Douglas* to ADEA discharge cases because his replacement was within the protected age group, the court then concluded that even under its less stringent reduction-in-force test, he also failed to

satisfy the fourth element because "O'Connor failed to demonstrate Consolidated did not treat age neutrally in discharging him." *O'Connor*, 56 F.3d at 547.[15/] The court also found that three ageist comments by his direct supervisor, all made within two months of O'Connor's discharge, were merely "stray remarks" which did not constitute direct evidence of age discrimination because there was no "nexus" between the remarks and the termination. *See Id.*, at 549-50.

The objective of the *prima facie* model is to permit the trier of fact to consider evidence relevant to the employer's intent and motivation in reaching a decision on the ultimate issue in the case. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). Here, rather than examining the evidence in light of the ultimate question,

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[15/] Recently, the Seventh Circuit in *Gadsby v. Norwalk Furniture Corp.*, 1995 U.S. App. LEXIS 35229 (7th Cir. 1995), also declined to apply its strikingly similar, less stringent reduction-in-force adaptation of *McDonnell Douglas* to a discharge case, even though there is "no meaningful reason why the prima facie case in the situation where an employee is discharged and not replaced due to a reduction in force should be different from the situation where an employee is discharged and not replaced for some other reason." 1995 U.S. App. LEXIS 35229, at 34 (Flaum, Circuit Judge, concurring.). [Judge Flaum concurred because Gadsby had not sufficiently proven pretext. *Id.* at 41.].

Because of the dearth of evidence, Gadsby was forced to rely solely on the fact that his employer retained younger workers. The Seventh Circuit found such reliance misplaced because "[i]f that were enough, practically any terminated employee in the protected class could make out a prima facie case of age discrimination since most companies will retain at least some employees under age 40." *Id.*, at 26.

As discussed herein, there is much more evidence which is much more probative of discriminatory intent in the case below than in *Gadsby*.

the court below seemed constrained by a need to categorize and separately consider each piece of evidence and, in the case of the three ageist statements by Williams, O'Connor's supervisor, to label the evidence as direct or indirect. However, had the focus of the inquiry "not be[en] obscured by the blindered recitation of a litany," *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir. 1982), the court below might have recognized in the evidence presented sufficient indicia of age bias to meet the low *prima facie* threshold. Further, the court's rejection of Williams' statement that "O'Connor, you are too damn old for this kind of work," made two weeks before O'Connor's discharge during the period of reorganization leading up to his termination as not meeting the standard for direct proof,[16/] discredits evidence which could be relevant and powerful indicators of the employer's state of mind.[17/]

Indeed, statements indicative of bias against older employees need not even be contemporaneous with the alleged discrimination to be admissible. *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989) (Statement made seven months after the plaintiff's discharge

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[16/] Direct evidence of a stated purpose to discriminate "is evidence which, if believed, would prove the existence of a fact . . . without any inference or presumptions." *O'Connor*, 56 F.3d at 548, quoting *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993).

[17/] If the quoted statement is not considered direct evidence, it along with the other two statements referring to O'Connor's age by O'Connor's supervisor - one of which was made two days before O'Connor was fired - interpreted in the light most favorable to petitioner, is circumstantial evidence from which discriminatory intent may be inferred. *See Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1501 (11th Cir. 1991).

was admissible because the jury could reasonably conclude "that it was merely a cumulative statement of managerial policies that had been sanctioned or favored by top executives . . . for a considerable time."); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (What the employer "said in March is certainly a good indication of what was on [the employer's] mind in February" where employee was discharged before management made statements indicative of age bias.); *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir. 1994) (Statements made *ten years* earlier that decisionmaker did not "like to be around old people" and that old people (those over 30) "should be confined to a concentration camp" held admissible.)

In the present case, in addition to two other statements made around that same time, only *two days* before O'Connor's discharge, his supervisor remarked that "[i]t's about time we get some young blood in this company." *O'Connor*, 56 F.3d at 549. Incredibly, the court below held the remark inadmissible because "[t]his apparently humorous comment is not probative of age discrimination." *Id.* Whether intended as a joke or not, however, such statements can raise an inference of age discrimination. *Rollins v. Tech-South, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987); *Dickson v. Amoco Performance Products*, 69 Fair Empl. Prac. Cas. (BNA) 228, 231 (N.D. Ga. 1994).

In *Futrell v. J. I. Case*, 38 F.3d 342 (7th Cir. 1994), the court of appeals severely admonished the district court for doing precisely what the Fourth Circuit has done in this case - discounting the value of several pieces of evidence, including ageist remarks, by separately considering the weight of each

piece rather than considering the evidence as a whole. However, the benchmark against which the court must always measure the evidence is whether it is relevant to the employer's intent. For example, in *Brom v. Bozell, Jacobs, Kenyon & Eckhardt*, 827 F. Supp. 686 (N.D. Ill. 1994), the court ruled as relevant a supervisor's statement that "people feel they want younger people on the account" because the statement related to the employer's perceptions about appropriate staffing decisions, particularly when the plaintiff was replaced by a younger person. Ageist statements such as those at issue in this case should not be rejected out of hand based on the defendant's characterization of them as "ambiguous." They are not at all ambiguous to a discharged older worker like O'Connor who was fired two days after his supervisor said that "[i]t's about time we get some young blood in this company."[18]

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[18]The skepticism of the court below regarding the admissibility of the statements at issue in this case possibly can be traced to the rationale of Chief Judge Haynesworth in *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980), who rejected statements indicating that a company's future lies with its young as evidence of a discriminatory purpose as follows:

> In any enterprise, today's juniors will be tomorrow's seniors. Today's seniors can help create a foundation for tomorrow's growth and prosperity, but future realization of the potential of an enterprise lies principally with those who will be in positions of leadership and responsibility in the future.

While such sentiments may be appropriate in a commencement address, they reflect a bias which the age discrimination law condemns. While the natural order in the work place may be that younger workers ultimately replace older workers for legitimate reasons related to job performance, the firing of older workers *because of their age* cannot be allowed to play any part in that process.

CONCLUSION

In it's ritualistic adherence to its requirement of a showing of replacement by a person outside the protected age group in order to satisfy the fourth element of the *prima facie* case, the court below failed to heed this Court's admonitions that the *McDonnell Douglas* framework must be applied flexibly in order to provide a day in court for victims of age discrimination. In rejecting both direct and circumstantial evidence of discriminatoryintent as failing to make out a *prima facie* case under any standard, the court failed to properly evaluate such evidence. For these reasons, the decision of the court below must be reversed.

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October Term, 1995

JAMES O'CONNOR,

Petitioner,

v.

CONSOLIDATED COIN CATERERS CORPORATION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL RETAIL FEDERATION IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICUS CURIAE*

The National Retail Federation (NRF) is the world's largest trade association. Its membership includes the leading department, specialty, discount, mass merchandise, and independent stores, as well as 32 national and 50 state associations. The NRF's members represent an industry that encompasses over 1.4 million retail establishments in the United States, employs nearly 20 million people (one in five American workers), and registered sales of more than $2.2 trillion in 1994.

The parties have consented to the filing of this brief.

Issues arising under the Age Discrimination in Employment Act, particularly when a reorganization, consolidation, or elimination of positions is involved, are of keen interest to the employing retailers because of the changes taking place within the retail industry. During the last several years various major retail and department store chains have reorganized, merged with one another, and eliminated duplicate or unprofitable facilities. The retailers' elimination of duplicate management structure, redundant staff, and facilities have led to complicated decisions involving personnel and employment actions. These changes and reorganizations have prompted and will continue to prompt, as the case below, claims of discrimination under the ADEA.

Additional concerns arise when it is asserted, as here by Petitioner, that an automatic presumption of illegal age discrimination arises simply because a "qualified" protected age worker is terminated and afterwards the work is performed by a younger worker. It is the experience of many retailers, when hiring to fill vacancies in

full-time sales and first level managerial positions in most areas of the country, that the applicant pool will be heavily populated by younger workers. Further, in assessing the qualifications and abilities of either employees or applicants, it is the experience of many retailers in today's environment that the younger person, due to educational and cultural differences, is much more likely to be literate and experienced in using computers to retrieve information. Such a worker gains quick access to extensive information systems data on inventory levels, pricing, cost, availability of merchandise, shipment dates, re-order information, etc., which enhances efficient and effective job performance in the retail industry.

SUMMARY OF ARGUMENT

In determining whether an employer was entitled to summary judgment in an ADEA disparate treatment discharge case, the Fourth Circuit properly used the traditional standards of proof applied in civil cases and focused upon the issue of unlawful motivation. In an ADEA case, as this Court has held, plaintiff's claim depends on whether age actually motivated the employer's decision.

Petitioner claims he established a *prima facie* case under this Court's *McDonnell Douglas* formula and that ADEA claimants in establishing a *prima facie* case should be relieved of the burden of making out a traditional circumstantial evidence case. However, strict use of the *McDonnell Douglas* formula in ADEA discharge cases is

inappropriate. A *prima facie* case of age discrimination is not established if plaintiff only shows that he was within the protected age group, that he had been performing his job for some time, and that his employment was terminated.

If the *McDonnell Douglas* framework is to be used, it must be appropriately modified to focus on whether plaintiff possesses sufficient evidence of disparate treatment of similarly-situated individuals on the basis of age to give rise to an inference of unlawful motivation or to show that the employer did not treat age neutrally in making personnel decisions. By appropriate modification to two parts of the original *McDonnell Douglas* framework, assessment of the discharged ADEA plaintiff's *prima facie* case can be squared with traditional analysis of proof in civil cases generally.

ARGUMENT

Petitioner ("O'Connor") brought suit claiming he was terminated by Respondent ("Consolidated") in violation of the Age Discrimination in Employment Act (ADEA), and requested a jury trial. (App. to Petition, p. 23). Consolidated moved for summary judgment because no genuine issues of fact existed and Consolidated was entitled to judgment as a matter of law. Granting Consolidated's motion, the District Court and Fourth Circuit found that O'Connor "failed to present any evidence that Consolidated did not treat age neutrally," and "O'Connor failed to establish . . . by direct and/or circumstantial evidence that he was terminated because of his age." *O'Connor v.*

Consolidated Coin Caterers Corp., 56 F.3d 542, 545, 546-49 (4th Cir. 1995).

In reviewing the decisions below, this Court has an important opportunity to clarify (1) the applicability of the standards of proof traditionally applied in civil cases to cases brought under the ADEA and (2) the applicability of the *McDonnell Douglas* framework to employment termination cases brought under the ADEA. Such clarification is critically important to employers in all industries, including the retail industry.

First, this Court should recognize that regardless of how the evidence in an ADEA case may be marshalled, an ADEA plaintiff, to survive summary judgment, must always come forward with sufficient evidence that a reasonable jury could infer that plaintiff's age actually motivated the employer's decision. As more fully explained below, this requirement is consistent with the traditional standards of proof in civil cases and should be applicable in all civil cases, including ADEA cases.

Second, this Court should clarify (1) whether the *McDonnell Douglas* framework applies at all in an ADEA discharge case, and (2) if it applies, how two key parts should be formulated. The NRF respectfully suggests that the *McDonnell Douglas* framework, even as modified by some courts, should not apply to ADEA discharge cases as they are significantly different from other employment discrimination cases. On the other hand, if this Court decides that the framework should apply, then the two key parts must be revised for ADEA discharge cases.

Finally, this Court should affirm the Fourth Circuit's decision because O'Connor failed to come forward with

evidence from which a reasonable jury could conclude age was a motivating factor in Consolidated's decision to terminate him.

I. IN ASSESSING WHETHER PLAINTIFF ESTABLISHED A *PRIMA FACIE* CASE OF AGE DISCRIMINATION, THE FOURTH CIRCUIT PROPERLY FOCUSED ON THE ISSUE OF UNLAWFUL MOTIVATION, USING TRADITIONAL STANDARDS OF PROOF IN CIVIL CASES.

To survive summary judgment, an ADEA plaintiff must present sufficient evidence that a reasonable jury could infer that age actually motivated the employer's decision. This requirement is consistent with the traditional standards of proof in civil cases and should be applicable in ADEA cases.

The application of this principal to ADEA cases is not new. In this case, the Fourth Circuit observed that courts must apply the "ordinary standards of proof used in civil cases" to assess whether a plaintiff is entitled to submit his case to the jury. 56 F.3d at 548. Other circuits also recognize that "a court considering summary judgment must decide whether plaintiff's facts, if believed, would prove that, more likely than not, the employer fired the employee because of his age." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 959 n.8 (5th Cir. 1993). Indeed, "[t]he standard for summary judgment mirrors that for directed verdict, so that if on any part of the *prima facie* case there would be insufficient evidence to require submission of the case to a jury, [the court] must affirm the grant of summary judgment." *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 609 (11th Cir. 1987); *see Leichihman v.*

Pickwick Intern., 814 F.2d 1263, 1269 (8th Cir. 1987), *cert. denied*, 484 U.S. 858 (1987) ("In choosing an appropriate framework for a *prima facie* case in a particular factual context, it must be remembered that the ultimate issue in a disparate treatment case is whether the employer intentionally discriminated against the plaintiff"); *LaGrant v. Gulf & W. Mfg. Co.*, 748 F.2d 1087, 1090 (6th Cir. 1984) ("A *prima facie* case is one where there is sufficient evidence to withstand a motion for summary judgment or for a directed verdict"); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1094 (5th Cir. 1981) ("plaintiff in a reduction-in-force ADEA case could establish a *prima facie* case by . . . producing evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate"); *see also Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1245 (D.C. Cir. 1984) (Scalia, J., dissenting) ("[I]n order to get to the jury the plaintiff would still have to introduce some evidence that would enable a reasonable person to conclude that the *bas s* for this discriminatory treatment was *race.*").

As this Court has recognized, liability in a disparate treatment case "depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993). Thus, the critical, essential element of plaintiff's ADEA case is illegal motivation, and "there is no disparate treatment when the factor motivating the employer is some feature other than the employee's age." *Id.* at 1705.

While a plaintiff's necessary proof may be based on direct evidence of discriminatory motive, plaintiffs in employment discrimination cases generally rely on –

> indirect evidence from which an inference of discriminatory motive may be drawn, namely, comparative evidence demonstrating that the treatment of the plaintiff differs from that accorded to otherwise 'similarly situated' individuals who are not within the plaintiff's protected group.

D. Shlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW, Chap. 36, "PROOF," p. 1291 (2d ed. 1983). Accordingly, when assessing whether the ADEA plaintiff established a *prima facie* case of discriminatory motive by relying on circumstantial evidence, the courts must focus on the relative ages of the individuals who are favored and adversely affected by the personnel decisions as well as the demonstrated qualifications and job performance of the individuals involved.

The Fourth Circuit, in this case, properly recognized that "[i]n order to establish his claim, O'Connor may rely on the normal methods of succeeding on a civil suit by establishing by a preponderance of the evidence that but for Consolidated's motive to discriminate against him because of his age, he would not have been discharged." 56 F.3d at 545. In finding against O'Connor and entering summary judgment, the Fourth Circuit focused on all the various facts, including the relative ages of the individuals involved and the comparative background, experience, and job performance of O'Connor and those who remained at work. After properly assessing the evidence under ordinary standards of proof (as set forth above), the Fourth Circuit properly affirmed the District Court's entry of summary judgment in favor of Consolidated.

II. THE *MCDONNELL DOUGLAS* FORMULA, EVEN AS MODIFIED BY CERTAIN COURTS, DOES NOT PROVIDE AN ACCEPTABLE ALTERNATIVE *PRIMA FACIE* CASE TEST IN ADEA DISCHARGE CASES.

O'Connor claims he established a *prima facie* case under the framework which this Court used in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973), as modified by the courts in an ADEA discharge case. O'Connor claims ADEA complainants should be relieved from the "burden of making out a traditional circumstantial evidence case." (Pet. Br., p. 6). Thus, O'Connor raises questions of first impression concerning the role that *McDonnell Douglas* plays in assessing whether or when a plaintiff makes a *prima facie* ADEA case and whether this Court intended that the *McDonnell Douglas* framework impose a lesser standard in ADEA jury cases when compared to the traditional standards of proof in civil jury cases. The NRF respectfully submits that the original *McDonnell Douglas* framework should not be applied to ADEA discharge cases; instead, the traditional standards of proof for civil jury cases should apply.

When this Court first described the burden-shifting formula in *McDonnell Douglas*, it cautioned: "The facts necessarily will vary in Title VII cases, and the specification above of the *prima facie* proof requirement . . . is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13. Four years later, this Court emphasized that:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof

> there required, but in its recognition of the general principles that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based upon a discriminatory criteria illegal under the Act.

International Bro. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

NRF respectfully submits that the *McDonnell Douglas* formula was not initially intended to determine whether plaintiff made a *prima facie* case for a jury; nor was it intended to shift the focus, when applying standards used generally in assessing proof in civil cases, away from the essential elements necessary to establish discriminatory motivation. From the beginning, the Sixth Circuit recognized that age discrimination jury cases were different and it would be inappropriate to simply borrow and automatically apply the guidelines established in *McDonnell Douglas*. *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312-13 (6th Cir. 1975).[1] The Eighth Circuit also

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[1] The role of the court in the jury tried case is decidedly different than the court in the non-jury Title VII case as this Court has recognized on numerous occasions: "We have cautioned that these shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence: 'The ultimate burden of persuading the trier of fact the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 986 (1988); *see also Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in

observed that the *McDonnell Douglas* framework is simply a checklist which is helpful in determining whether a *prima facie* case of illegal motive based on circumstantial evidence has been established in the traditional sense and "any modification of the *prima facie* case described in *McDonnell Douglas* must still require the plaintiff to create an inference of a discriminatory reason for his termination." *Leichihman*, 814 F.2d at 1269-71.[2]

The Fourth, Seventh, and Tenth Circuits have concluded erroneously that an ADEA plaintiff may prove age discrimination in one of two alternate ways. *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988); *Lucas v. Dover Corp.*, 857 F.2d 1397, 1400 (10th Cir. 1988). In this case, the Fourth Circuit observed that "O'Connor 'may meet [his] burden under the ordinary standards of proof by direct or indirect evidence relevant to and sufficiently probative of the issue [of motivation].' Alternatively, O'Connor may resort to the proof scheme articulated for Title VII cases in *McDonnell Douglas*." 56 F.3d at 545. Borrowing from earlier Fourth Circuit cases "under the *McDonnell Douglas*

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light of common experience as it bears on the critical question of discrimination").

[2] That assessment is to be compared to Judge Posner's observation that:

> the *McDonnell Douglas* "*prima facie* case" is not a "real" *prima facie* case, in the conventional sense of a case strong enough to withstand a defendant's motion for summary judgment, because it does not entitle the plaintiff to a trial. More properly termed a presumption, it is a device for making the defendant speak, and once he does speak it falls out.

Palucki v. Sears Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989).

rubric" the Court below held that O'Connor must prove (1) he was in the protected age group, (2) he was discharged, (3) at the time of discharge, he was performing his job at a level that met his employer's legitimate expectations and (4) following his discharge, he was replaced by someone of comparable qualifications outside the protected class. 56 F.3d at 546.

As we show below, modification of the *McDonnell Douglas* framework in ADEA discharge cases has caused much confusion and conflict in the circuits. Whether the modified *McDonnell Douglas* framework offers ADEA plaintiffs a lesser burden than traditional circumstantial evidence analysis depends on whether the modification focuses on comparative treatment evidence.

The problem of applying the *McDonnell Douglas* framework to ADEA cases is best demonstrated by the confusing and conflicting results in the same types of case in different circuits and sometimes even within the same circuit. The Seventh Circuit has observed this very problem within its circuit:

> The precedents in this circuit set forth several somewhat confusing variations of the elements required to establish a *prima facie* case of age discrimination. Some adaptation is inevitable given the various types of employment actions – i.e., hiring, demotions, discharges – that may be at issue in the same case. However, we have found variations even within a particular class of action.

Kralman v. Illinois Dept. of Veterans' Affairs, 23 F.3d 150, 153 (7th Cir. 1994). The most dramatic result of this confusion comes from another Seventh Circuit case

where, in detailing the "several important functions" which the *McDonnell Douglas* burden-shifting method of proof served, the Court stated:

> Finally, and most important, in some cases, the method "allows victims of discrimination to prevail without presenting *any evidence* that age was a determining factor in the employer's motivation."

Oxman, 846 F.2d at 453 (emphasis added).

This confusion is readily apparent in ADEA employment termination cases. The *McDonnell Douglas* framework was designed to require a job applicant, as a part of his *prima facie* case to "demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *Teamsters*, 431 U.S. at 358 n.44. In the employment termination case crafting a revised *McDonnell Douglas* framework is much more complicated. An employee may be terminated, for example, because of unsatisfactory job performance, violation of a work rule regulating conduct, the elimination of his job, a more general reduction in force affecting a number of the same or similar jobs or the consolidation of jobs. Such complexities have caused the various modifications of *McDonnell Douglas* to move away from the focus on the most likely reason for termination to a focus on comparative treatment of similarly-situated individuals. However, this more refined approach, which moves closer to the traditional analysis, has resulted in different formulations of the two elements that are frequently contested: (1) whether the protected age plaintiff was

"qualified" or "satisfactorily performing his job" at the time of discharge (the Fourth Circuit "third prong"), and (2) whether plaintiff has established similarly-situated, substantially younger employees or employees outside the protected age group were treated differently (the "fourth prong").

A. Application of the Third Part of the *McDonnell Douglas* Framework to ADEA Cases Has Resulted in Conflicting and Confusing Opinions.

Looking first to cases interpreting the "qualified" element, most circuits have different requirements for ADEA discharge cases. The Fourth, Eighth, Ninth, and Tenth Circuits require the ADEA plaintiff to show that at the time of discharge he was performing his job at a level that met his employer's legitimate expectations or at least that he was doing satisfactory work. *E.g., Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993); *Leichihman*, 814 F.2d at 1268; *Wallis v. J. R. Simplot Co.*, 26 F.3d 885, 891 (9th Cir. 1994); *Lucas*, 857 F.2d at 1400. The Fourth Circuit below, as detailed above, and the Ninth Circuit emphasize the core "comparative treatment" analysis by adding a "qualification" requirement to the fourth prong similar to the original *McDonnell Douglas* fourth prong:

> An employee may establish a *prima facie* case of age discrimination under the disparate treatment theory by showing he: (1) was a member of the protected class . . . ; (2) was performing his job in a satisfactory manner; (3) was discharged; and (4) was replaced by a substantially

younger employee *with equal or inferior qualifications.*

Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990) (emphasis added) (*citing Palmer v. United States*, 794 F.2d 534, 536-37 (9th Cir. 1986)). And the Seventh Circuit emphasizes that even though the employee performed satisfactorily in the past, the employee must show that he was meeting the expectations of the employer at the time of termination. *Karazanas v. Navistar Intern.*, 948 F.2d 332, 336 (7th Cir. 1991). The First Circuit employs the term "qualified," but in the sense that plaintiff "was doing his job well enough to rule out the possibility he was fired for inadequate job performance, absolutely or relative." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979).

On the other hand, in the Second, Third, Fifth, and Sixth Circuits, the courts have strictly adhered to the *McDonnell Douglas* formula and require only that the discharged plaintiff show he was "qualified for the position." *E.g., Pena v. Brattleboro Retreat*, 702 F.2d 322, 324 (2nd Cir. 1983); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3rd Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir. 1993); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir. 1982).

In significant contrast, the Eleventh Circuit completely eliminates the requirement that plaintiff meet even the limited "qualified" prong when the plaintiff has been in the position from which he was discharged for some time. *See Pace v. Southern Ry. System*, 701 F.2d 1383, 1386 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983); *Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1495

n.2 (11th Cir. 1987) ("The reason for this modification is that in cases where plaintiff has held a position for a significant period of time, qualification for that position sufficient to satisfy the test of a *prima facie* case can be inferred."). Seemingly, not much at all is required if this modification is used.

Because the *McDonnell Douglas* formula is not easily adapted to the ADEA discharge cases, it should not be applied in those cases to displace traditional standards of proof. Assuming, however, that the *McDonnell Douglas* framework is applicable to ADEA discharge cases, this Court's resolution of the conflict over the formulation of the "qualified" or "satisfactory performance" element is critical in assessing the result below and proof in future ADEA cases. It is difficult to imagine that the focus of a court's inquiry regarding this third element would be on anything but the plaintiff's "performance" at the time of the adverse personnel action. The NRF urges this Court to adopt that focus.

Applying that focus to this case, the Fourth Circuit assessed that "O'Connor was not performing well in August of 1990" when he was terminated even though he had been in the job for some time. 56 F.3d at 547. Thus, the Fourth Circuit's assessment of the evidence under its modified *McDonnell Douglas* ADEA formula produces the same result as the Fourth Circuit's use of standard methods of assessing proof of illegal motivation. The NRF respectfully suggests that this Court clarify whether the *McDonnell Douglas* framework applies to ADEA cases, and if it does, the NRF urges this Court to focus part of the framework on plaintiff's performance at the time the discharge decision is made.

B. A Rigid Application of the Fourth Part of the McDonnell Douglas Framework ("Still Searching") to ADEA Discharge Cases Has Been Largely Rejected.

The Circuit Courts in ADEA discharge cases have generally rejected the "continues to search" fourth prong of *McDonnell Douglas* in favor of comparative treatment analysis. While such a step moves the modified *McDonnell Douglas* framework closer to the traditional analysis of proof of motivation, there is confusion regarding the weight that should be given to the relative ages of allegedly similarly-situated individuals.[3]

Although not argued below, both Petitioner and Amicus Equal Employment Opportunity Commission argue that there should be no focus upon the comparative characteristics of the plaintiff and other individuals selected by the employer to perform the work previously performed by plaintiff. (Pet. Br., p. 16). However, if a "real" *prima facie* case is to result, then comparative treatment of similarly-situated individuals is critical. For this reason all of the circuits have properly rejected such a limited formula because in effect, in the ADEA discharge case, it merely requires the plaintiff to show that he or she was in the protected age group and was then terminated.

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[3] The modified "fourth prong" has also been used in Title VII race discrimination discharge cases by the lower courts. *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (citing the lower court decision there which characterized the fourth prong: "that the position remained open and was ultimately filled by a white man").

Focusing on the comparative ages of the involved individuals has also raised questions. The Sixth Circuit has observed:

> The processing of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. This factor of progression replacement is not necessarily involved in cases involving the immutable characteristics of race, sex and national origin.

510 F.2d at 312, n.4. The Eighth Circuit has rejected an "automatic presumption" of discrimination when a younger worker replaces an older worker. *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1167 (8th Cir. 1985) ("the fact alone that Holley's duties were assumed by a younger person – the fact of an age differential – itself is insufficient additional evidence to establish a *prima facie* case"); *Leichihman*, 814 F.2d at 1270 ("In *Holley*, we agreed with the Sixth Circuit that the ADEA does not create "automatic presumption" against an employer whenever an older worker is replaced by a younger one.").[4]

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[4] Where there is a delay in selecting a replacement, the fact the replacement is younger may not create a *prima facie* case and additional evidence may be required. *Rose v. Wells Fargo & Co.*, 902 F.2d at 1422 (many of the duties were assumed by a younger worker but some six or seven months later) (citing *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941 (6th Cir. 1987) (younger replacement arrived three months later)).

The Seventh Circuit has recognized that:

> It is not a violation of the ADEA to replace an employee in the protected class with a younger person, as long as the protected employee is not replaced because of his age. Because younger people often succeed to the jobs of other people for perfectly legitimate reasons, the mere fact that an older employee is replaced by a younger one does not permit an inference that the replacement was motivated by age discrimination.

La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1413 (7th Cir. 1984). Similarly, the Fifth Circuit looked to cases from other circuits and concluded:

> We agree with the tenor of these cases in so far as they establish that replacement by one within the protected category will not *preclude* proof of a prima facie case. However, in no case does the court hold that as a matter of law a prima facie case is established if a plaintiff simply shows he is in the protected group, was adversely affected by an employment decision, was qualified, and was replaced by one younger than himself. In each of these cases not only was the plaintiff replaced by someone younger but there also was other evidence of discrimination based on age.

Pace v. Southern Ry. System, 701 F.2d 1383, 1390 (5th Cir. 1983).

In reduction-in-force cases where there is no replacement (as plaintiff's job is simply eliminated), the Courts have required plaintiffs to satisfy the fourth prong by other evidence from which an inference of discriminatory intent can be drawn. *E.g., Bashara v. Black Hills Corp.*, 26

F.3d 820, 823 (8th Cir. 1994) (to establish a prima facie case in a reduction-of-force situation, the plaintiff must meet the first three requirements and " 'must come forward with additional . . . evidence that age was a factor in his termination.' "); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842 (1st Cir. 1993) (in a reduction in force case to satisfy element (4), the plaintiff may demonstrate either that the employer did not treat age neutrally or that younger persons were retained in the same position); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988) (in reduction-in-force cases, courts have modified the fourth *prima facie* element by requiring the plaintiff to produce evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue); *EEOC v. Western Electric Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983) (the fourth element in a reduction-in-force modified formula is usually characterized by stating that a plaintiff must produce "some other evidence that the employer did not treat age neutrally").

If some modified *McDonnell Douglas* framework is applicable to ADEA cases, this Court's clarification of the showing an ADEA plaintiff must make under the fourth part of the test is crucial to the result below and future ADEA cases. Simply requiring an ADEA plaintiff to demonstrate that he was replaced by someone younger (perhaps only six months younger) hardly demonstrates age animus on the part of an employer. On the other hand, requiring plaintiff to show that he was replaced by an individual outside the protected class creates a more direct tie to the possibility that age may have been a determining factor in the employment decision.

At least, any modified *McDonnell Douglas* fourth prong should focus in all ADEA discharge cases upon a formulation borrowed from the reduction-in-force cases where comparative treatment evidence was necessarily limited. Accordingly, an ADEA protected group plaintiff could meet this fourth prong by producing other evidence from which it can be reasonably inferred that the employer intended to discriminate against the plaintiff because of his age or did not treat age neutrally in its decision-making process. This general requirement is necessary because, as the Eighth Circuit has observed:

> A *prima facie* case, although a minimal showing, at least requires the plaintiff to show that the employer's actions were more likely than not based on a consideration of impermissible factors.

Leichihman, 814 F.2d at 1270. Such a modification of the fourth prong squares the *McDonnell Douglas* framework with traditional analysis of proof in civil cases. If this fourth prong test is adopted, the Fourth Circuit's decision should be affirmed, as the courts below found that O'Connor failed to supply the necessary evidence.

CONCLUSION

For the reasons set forth above, in deciding Consolidated's motion for summary judgment, the Fourth Circuit properly focused on traditional methods of proof in civil cases. Petitioner's claim that he should only be required to satisfy a lesser burden under the original *McDonnell Douglas* framework should be rejected. Attempts at modification of the *McDonnell Douglas* formula in ADEA discharge cases has caused conflicting and confusing interpretations. If a modified *McDonnell Douglas* formulation is to be used, the focus must be on the comparative treatment of similarly-situated individuals. Only by such evidence can a plaintiff establish a *prima facie* case from which a reasonable fact-finder might infer that the employer acted with the improper motive of discriminating against the plaintiff because of his age or failed to treat age neutrally in its employment decisions.

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In The
Supreme Court of the United States
October Term, 1995

JAMES O'CONNOR,

Petitioner,

v.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

On Petition For Writ of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977. Its membership consists of corporations, individuals and others who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. See, e.g., Hazen Paper Co. v. Biggins, 505 U.S. ___, 120 L.Ed. 2d 868 (1992); Ernst & Young, L.L.P. v. R.I. Depositors Economic Protection Corp.,133 L.Ed 2d 405 (November 13, 1995).

NELF is deeply concerned about the application of the Age Discrimination in Employment Act ("ADEA" or the "Act"). Differing interpretations of that Act can seriously and adversely impact employment decisions in which NELF's members and supporters are involved. Due to the potential for significant legal exposure arising out of legitimate employment decisions, NELF is concerned about the significant negative impacts of a reversal of the United States Court of Appeals for the Fourth Circuit's decision in this case. More broadly, NELF is concerned that a reversal of the decision below may encourage other courts to expand the liability of an employer to an employee at the expense of sound business judgment/decisionmaking.

NELF, therefore, seeks to file a brief amicus curiae in support of Consolidated Coin Caterers Corp. ("Consolidated Coin"), the Respondent in this action. Pursuant to Supreme Court Rule 37.2, NELF has obtained consent for the filing of this amicus brief from counsel for the petitioner and the respondent.

STATEMENT OF THE CASE

NELF accepts and relies upon the statement of the case contained in the Respondent's Brief.

ARGUMENT:

I. UNDER THE McDONNELL DOUGLAS PROOF SCHEME A CLAIMANT MUST ESTABLISH THAT A YOUNGER REPLACEMENT IS OUTSIDE THE PROTECTED CLASS IN THE ABSENCE OF OTHER PROBATIVE EVIDENCE OF DISCRIMINATION IN ORDER TO ESTABLISH A PRIMA FACIE CASE OF AGE DISCRIMINATION.

A. A Prima Facie Case under the ADEA Requires The Introduction Of Some Evidence Which Raises An Inference Of A Nexus Between The Plaintiff's Age And The Employment Decision.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), this Court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." St. Mary's Honor Center v. Hicks, _ U.S. _, 113 S. Ct. 2742 (1993). Under McDonnell Douglas, a prima facie case requires the presentation of evidence which will sustain an inference of unlawful discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). This Court has not specifically set forth the necessary elements of a prima facie case under the Age Discrimination in Employment Act ("ADEA" or the "Act").[1] In recent years, lower courts have utilized the McDonnell Douglas analysis as a guide for ADEA cases. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Loeb v. Textron,

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[1] The ADEA forbids discrimination based on an individual's age. The Act's protections are limited to individuals who are at least forty (40) years old. 29 U.S.C. § 631(a).

Inc. 600 F.2d 1003, 1010 (1st Cir. 1979); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977).

In the present case, the Fourth Circuit properly required the plaintiff to introduce evidence which satisfied this Court's requirement that a prima facie case be established only by introducing facts which, if otherwise unexplained, give rise to a sustainable inference of illegal discrimination. See e.g. International Brotherhood of Teamsters v. United States, 431 U.S. 344, 358 (1977); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 n.6 (1981); Hicks, 113 S. Ct. at n.3. The Fourth Circuit required the plaintiff to prove the following facts in order to establish a prima facie case of age discrimination under the ADEA:

> (1) [he] is in protected age group; (2)[he] was discharged or demoted; (3) at the time of discharge or demotion, {he} was performing his job at a level that met his employer's legitimate expectations, and (4) following his discharge or demotion, [he] was replaced by someone of comparable qualifications outside the protected class.

O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995) (emphasis added).

The prerequisites to a prima facie case set out by the Fourth Circuit are appropriate in a situation where, as here, the age characteristic of the replacement is the only circumstantial evidence presented to satisfy the required inference that age was a motivating factor in the challenged employment decision.

B. An Age Comparison Alone Is Insufficient To Support An Inference Of Illegal Age Discrimination.

The critical determination in this type of litigation is whether plaintiff has proven by a fair preponderance of the evidence that an

impermissible consideration, such as gender or age, was a substantial motivating factor in the challenged employment decision. In the context of the McDonnell Douglas scheme, the mere comparison of ages, without more, is insufficient to support an inference that age played a determining role in the discharge decision. No inference can be generated because no disparate treatment which requires an explanation has occurred. It is simply a fact of life that when an older employee is replaced, more often than not a younger person will be hired. Thus, the replacement of an older employee with a younger person, without more, does not support a conclusion that the employment action was a product of illegal age discrimination with any reasonable probability. See e.g. Laugesen v. Anaconda Company, 510 F.2d 307, 313 n. F.2d 1062, 1066 (4th Cir. 1980).

For purposes of prima facie analysis, the inference of illegal discrimination is generated by the fact that a non-protected person is being favored over a protected person. "The fourth element required to establish a 'prima facie case' of discrimination was intended to demonstrate unequal treatment by the relatively objective evidence of replacement by a member of a non-protected class." EEOC v. Western Electric Co., Inc., 713 F.2d 1011, 1014-15 (4th Cir. 1983). This approach is consistent with the inference recognized by numerous courts in both the Title VII and ADEA context. See e.g., Hicks, U.S. , 113 S. Ct. at 2745; Meinecke v. H & R Block Income Tax School Inc., 66 F.2d 77, 83 (5th Cir. 1995); Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1247 (6th Cir. 1995); Walker v. Nationsbank of Florida, N.A., 53 F.3d 1548, 1556 (11th Cir. 1995).

The Fourth Circuit appropriately applied this logic to the ADEA setting and adhered to the statutory distinction between protected (age forty and over) and non-protected (under age forty) age groups established by Congress in the ADEA. See 29 U.S.C. § 631(a). This approach is necessary to support an inference of illegal discrimination where the claimant seeks to rely on the age

characteristic of the replacement as part of a McDonnell Douglas prima facie case. Moreover, this approach is consistent with the legislatively dictated "protected" and "unprotected" categories. Those categories reflect a Congressional intent to address and combat stereotypes that arise merely because one is a member of a particular class.

The text of the ADEA does not create any hierarchy within the protected class. Clearly, Congress did not intend to set forth a general rule that every employment decision that involves two workers must always favor the older employee. Mere chronological age distinctions between two protected persons do not trigger an employer's legal liability under the ADEA. If Congress had wanted to create such a liability scheme it could have specifically done so. Consequently, this Court should affirm the Fourth Circuit's approach which relied on the statutorily created classes.

C. The Fourth Circuit Approach Does Not Prohibit A Claimant From Establishing An Inference Of Discrimination By Using An Intra-Class Comparison.

It is important to acknowledge that the Fourth Circuit approach does not preclude a plaintiff from establishing an age discrimination claim where the replacement is also within the protected class. The McDonnell Douglas proof scheme is not the only method of establishing an ADEA claim.[2] The fact that a plaintiff must point to a replacement outside the protected class when relying solely on the replacement's age and utilizing the McDonnell Douglas test, does not affect his/her ability to rely on an intra-protected age group comparison as circumstantial evidence of discrimination under traditional methods of proof. Although an intra-group comparison without more is insufficient to support an inference of

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[2] Moreover, the age of a replacement is not the only means of establishing an inference of age discrimination under the rubric of McDonnell Douglas.

age discrimination, a 63 year old employee can still demonstrate that he/she was discriminated against when his/her replacement was 42 years old, so long as he/she can present evidence of actual discrimination.

II. SOUND PUBLIC POLICY SUPPORTS THE FOURTH CIRCUIT'S DECISION.

The approach used by the Fourth Circuit is buttressed by considerations of social policy. No reasonable person can avoid recognizing the statistical certainty that the older the employee the greater the likelihood that his/her replacement will in fact be younger. Most of the time when an employee in his/her late fifties or sixties is replaced it is by a younger person. The older the replaced employee, the greater the ratio between the number of potential replacements who are younger and the number who are older. Clearly, therefore, replacement by a younger person in and of itself does not support the requisite inference of illegal discrimination, particularly where, as here, the replacement is also a member of the protected class.

The ADEA does not require that every plaintiff in a protected age group be allowed a trial simply because he was discharged during a reduction in force. Holley v. Sanyo Mfg.,771 F.2d 1161, n.1 (8th Cir. 1985). The prima facie case plays an important role in helping "district courts identify meritless suits and stop[ping] them short of full trial." Steckl v. Motorola, Inc., 703 F.2d 392, 394 (9th Cir. 1983). An approach such as the one advocated by the Petitioner, whereby a plaintiff could establish a prima facie case merely by showing that he/she was replaced by a younger employee would thwart achievement of this goal. Moreover, it would unfairly shift the balance of rights between employers and employees in a manner inconsistent with the statutory scheme enacted by Congress and result in needless expenditures of time, money and judicial resources.

If the approach taken by the Fourth Circuit is not sanctioned, legitimate business decisions of employers will be further tainted in order to avoid potential, meritless discrimination claims. For example, each and every time an employer makes a decision to hire or fire an older worker he/she must evaluate the likelihood that a lawsuit will be brought and that the decision will have to be legitimized by a preponderance of the evidence. As a practical matter, particularly in light of the additional expense of litigation, in termination/replacement cases these considerations will most likely result in preferences toward older employees whenever there is some doubt whether the employer's explanations will be sanctioned by a judge or jury. Unfortunately, this will occur even in cases where the decision is made without regard to an employee's age. There is no support for such preferential treatment in either the language or the legislative history of the ADEA. This situation will be exacerbated if a plaintiff is allowed to establish a prima facie case merely by showing that the replacement is a younger member of the protected class. Moreover, no positive social benefit will be derived from such a scheme in instances where the only evidence in support of an age discrimination claim is the fact that the replacement is younger.

At the other end of the spectrum lies the prospect that the Petitioner's position could actually harm some older employees. If employers feel that the ADEA will make it significantly more difficult to replace older employees, they may be deterred from hiring otherwise attractive candidates for employment out of a fear that they will never be able to replace that employee without facing the time and expense of a jury trial. Consequently, forty and fifty year old individuals may find it harder to find employment. Clearly, such a result is the exact opposite of what the ADEA was intended to accomplish and would unfairly burden both employers and older employees.

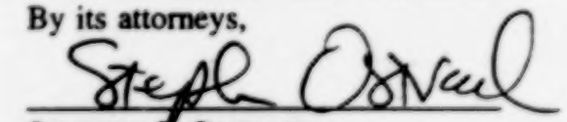
The approach taken by the Fourth Circuit balances the legitimate concerns of both employers and employees by requiring

an employee who seeks relief under the ADEA to at least establish that the replacement was a member of the unprotected class or provide some evidence, direct or circumstantial, indicative of illegal discrimination. This minimum requirement will limit the number of specious claims brought against an employer who makes a legitimate business decision that happens to result in replacement by a younger individual. At the same time, this approach will adequately protect the rights of older employees with legitimate claims.

CONCLUSION

For the reasons set forth above and articulated in the Brief of the Respondent, NELF respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,
NEW ENGLAND LEGAL FOUNDATION
By its attorneys,



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(8)

No. 95-354

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAMES O'CONNOR,
Petitioner,

v.

CONSOLIDATED COIN CATERERS CORP.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, in a suit under the Age Discrimination in Employment Act, a plaintiff who has been replaced is entitled to the judicially-created inference of unlawful employer intent arising from the *McDonnell-Douglas* proof scheme without making any showing regarding the age of his replacement.

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IN THE
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JAMES O'CONNOR,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with this brief with the Clerk of the Court.

employers before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation.[2]

This case presents a fundamental issue concerning what is required of a replaced plaintiff in a suit under the Age Discrimination in Employment Act to establish a prima facie case pursuant to the proof scheme established by this Court in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). Specifically, this Court must determine whether a replaced plaintiff will be entitled to the judicially-created inference of unlawful employer motive without making a showing regarding the replacement's age. The Court of Appeals held that the status of the replacement employee was vital to the plaintiff's prima facie case under *McDonnell-Douglas* in an ADEA suit.

In such litigation, the framing of plaintiff's burden under *McDonnell-Douglas* defines the circumstances in which employers are required to defend against claims of illegal age discrimination when there has been no affirmative showing, at that point, of unlawful employer intent. Thus, this issue is crucial to employers who must expend significant amounts of time and money defending against age discrimination lawsuits, a great number of which are baseless. The resolution of this question will have a direct and recurring impact on the employer companies and associations who are members of the Chamber. Accordingly, the Chamber believes its perspective on this issue may be of help to the Court in its consideration of the question here presented.

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[2] *See, e.g., NLRB v. Town & Country Elec., Inc.*, —— U.S. ——, 115 S. Ct. —— (1995); *Livadas v. Bradshaw*, —— U.S. ——, 114 S. Ct. 2068 (1994); *ABF Freight Sys., Inc. v. NLRB*, —— U.S. ——, 114 S. Ct. 835 (1994); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1707 (1993); *St. Mary's Honor Ctr. v. Hicks*, —— U.S. ——, 113 S. Ct. 2742 (1993); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

SUMMARY OF THE CASE

Respondent, Consolidated Coin Caterers Corp. ("Consolidated"), is a vending and food service company. Although separately incorporated, Consolidated operates as a division of its parent company, Canteen Corp. (Pet. App. 26).

Petitioner, James O'Connor, began his employment with Consolidated in 1978. In December, 1989, Petitioner became the District Manager of the Consolidated region known as "4Cs South." In July, 1990, Petitioner's immediate supervisor, Ed Williams, reallocated a segment of Petitioner's region to another manager. On August 9, 1990, Consolidated terminated Petitioner as part of a reorganization. At that time, Petitioner was 56 years old. (Pet. App. 26).

After the reorganization, Consolidated operated only two districts, instead of the four it previously had operated. Petitioner's old region was combined into a new district also called "4Cs South.". Consolidated retained a 40-year old employee, Ted Finnell, to manage the new "4Cs South" region. (Pet. App. 26).

Petitioner brought this suit alleging that his termination violated the Age Discrimination in Employment Act, 29 U.S.C. § 623. After substantial discovery, Consolidated moved for and the disrtict court granted summary judgment. The district court held that Petitioner had not established a prima facie case under *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), because he not only failed to show that his replacement was younger than 40 and thus outside the protected class, but also failed to present any other evidence demonstrating that Consolidated had not treated age neutrally in terminating Petitioner. (Pet. App. 29-30). The district court further found that Petitioner likewise failed to make a prima facie case using traditional principles of proof. (Pet. App. 30-34). The court discounted Petitioner's direct evidence, statements made by his immediate supervisor, because

there was no relationship between the statements and the decision to discharge Petitioner. (Pet. App. 31). Additionally, the district court found unpersuasive Petitioner's indirect evidence comparing his job performance with that of his replacement. (Pet. App. 33-34).

On appeal, the Fourth Circuit upheld the grant of summary judgment stating that "applying the *McDonnell-Douglas* paradigm we conclude that O'Connor cannot establish a prima facie case because he fails to satisfy the fourth element, *i.e.*, he was not replaced by someone outside the protected class." (Pet. App. 10). Agreeing with the district court, the court of appeals also concluded that Petitioner had not proven a prima facie case of age discrimination under ordinary standards of proof using direct or circumstantial evidence. (Pet. App. 15-19).

SUMMARY OF THE ARGUMENT

In a disparate treatment case under the Age Discrimination in Employment Act, a plaintiff is required to prove that his employer discriminated against him because of his age. Plaintiff has the initial burden of establishing a prima facie case demonstrating the employer's unlawful intent. A plaintiff may establish a prima facie case through one of two ways. First, he may do so through traditional methods of direct, indirect, or circumstantial proof. When such traditional evidence is unavailable, however, the plaintiff may resort to the inference of discriminatory employer intent created by this Court in *McDonnell-Douglas v. Green*, 411 U.S. 401 (1973).

In *McDonnell-Douglas*, this Court provided that a plaintiff in a discrimination suit is entitled to an inference of illegal employer animus, despite the absence of an affirmative showing to that effect, if a four-part formulation is satisfied. The Court reasoned that the facts established pursuant to this four-part formula would eliminate the two most obvious reasons for an adverse employment action, poor job performance and lack of a position. This

would leave room for an inference of the critical unlawful motive.

The instant case presents the question of how the fourth prong of the original *McDonnell-Douglas* framework—whether the employer continued to seek to fill the open position—should be applied when the plaintiff actually has been replaced. The Chamber urges modification of the fourth prong to require that, in the replacement context, the plaintiff in an ADEA suit must establish that the replacement was outside the protected class. In the alternative, the Chamber suggests that the plaintiff be required to demonstrate that the replacement was "substantially younger." The Chamber also recommends that this "substantially younger" standard be interpreted to require at least a ten-year age disparity between the plaintiff and the replacement.

A showing that plaintiff's replacement was outside the protected class or, in the alternative, "substantially younger" is necessary to justify the *McDonnell-Douglas* inference of discriminatory animus. No such inference can be justified by common sense or experience when the plaintiff, and the replacement, both are within the class protected by the ADEA or when the relative ages of the two employees are comparable or only slightly different.

Neither of the suggested requirements would unduly burden plaintiffs who have legitimate claims of discrimination because proof of age is readily available and easily established. A plaintiff always has the option of establishing the prima facie case by utilizing traditional evidence. Further, the Chamber's proposed definite standard will discourage meritless discrimination claims that unjustifiably burden employers and clog the legal system.

Moreover, the decision in this case undoubtedly will have wide-ranging effects in Title VII litigation and will provide guidelines for determining whether the characteristics of a replacement have relevance with respect to the *McDonnell-Douglas* formulation under that statute.

ARGUMENT

I. TO BE ENTITLED TO THE *McDONNELL-DOUGLAS* INFERENCE, AN ADEA PLAINTIFF WHO HAS BEEN REPLACED SHOULD BE REQUIRED TO ESTABLISH THAT THE REPLACEMENT WAS OUTSIDE THE PROTECTED CLASS OR, IN THE ALTERNATIVE, WAS SUBSTANTIALLY YOUNGER.

The question presented in the instant ADEA case is how the fourth element of the *McDonnell-Douglas* framework for establishing a prima facie case should be formulated when the plaintiff actually has been replaced.[3]

The Chamber submits that, in such circumstances, the fourth element of the *McDonnell-Douglas* test should be modified to require that a plaintiff must establish that the replacement employee was outside the protected class or, in the alternative, was substantially younger.

A. *McDonnell-Douglas* Principles in the ADEA Context

This Court has established a litigation framework, applicable in both ADEA and Title VII suits, wherein the plaintiff initially has the burden of establishing a prima facie case demonstrating the employer's unlawful motive.[4]

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[3] Petitioner and *Amicus* AARP have misconceived completely the question at issue. Contrary to their assertions, the question is not whether a plaintiff must show that the replacement is outside the protected class to make out a prima facie case of age discrimination, for it is unquestioned that, using traditional methods of proof, a plaintiff may establish a prima facie case regardless of the characteristics of the plaintiff's replacement. Rather, the question before this Court is whether a plaintiff, who has been replaced, may avail himself of the substantial aid provided by the judicially-created *McDonnell-Douglas* inference when the replacement is within the protected class.

[4] This Court has recognized that *McDonnell-Douglas* created a framework of proof applicable to the ADEA. *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1707 (1993). *See also St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2757 (1993) (Souter, J., dissenting).

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A plaintiff may establish a prima facie case through traditional evidentiary methods utilizing direct, indirect, or circumstantial evidence.[5] The Court has noted, however, with regard to the critical issue of employer intent, that it often will be difficult to find such evidence. To aid plaintiffs in overcoming this obstacle, the Court, in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), created an alternative scheme of proof whereby a plaintiff will be deemed to have established a prima facie case even absent an affirmative showing of unlawful employer intent.[6] *Id.* at 802. The *McDonnell-Douglas* proof scheme is an artifice providing that, once all of the elements of the scheme have been satisfied,

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[5] Use of such ordinary principles of proof does not implicate special judicially-created presumptions or inferences related to the evidence. *Lovelace v. Sherwin-Williams*, 681 F.2d 230, 239 (4th Cir. 1982).

[6] Since the purpose of the *McDonnell-Douglas* proof scheme is to aid plaintiffs due to the unavailability of evidence, *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985), its inference is surrogate proof for plaintiffs when actual evidence is not available to them. Accordingly, this proof scheme may be resorted to only when there is no direct, indirect or circumstantial evidence of employer motive. It is inapplicable when the plaintiff is able to present such direct or indirect evidence of discrimination. *Id.*

It could be argued that, technically, the district court in this case should not have applied the *McDonnell-Douglas* analysis because Petitioner presented direct and circumstantial evidence of discrimination. The district court, however, concluded that Petitioner's evidence was insufficient to establish a prima facie case under traditional methods of proof. (Pet. App. 29-35).

Criticism by Petitioner and *Amicus* AARP of the district court's examination of Petitioner's direct evidence, including allegedly ageist statements, is completely irrelevant to the instant issue concerning the proper approach to interpreting the fourth element of the *McDonnell-Douglas* scheme.

discriminatory intent becomes a "legally mandatory inference." *Burdine*, 450 U.S. at 255 n.10.

Under the original formulation in *McDonnell-Douglas*, a plaintiff in a disparate treatment case will be deemed to have proved a prima facie case of discrimination if it is shown that:

> (1) plaintiff belongs to a [protected class];
>
> (2) plaintiff applied for and was qualified for a job for which the employer was seeking applications;
>
> (3) despite plaintiff's qualifications, he was rejected; and
>
> (4) after plaintiff's rejection, the position remained open and the employer continued to seek applications from persons with complainant's qualifications.[7]

411 U.S. at 802.

If this requisite showing is made, the two most obvious reasons for the adverse employment action, poor job performance and elimination of the position, are removed. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Room then is left for an inference that the plaintiff's membership in the protected class is the basis for the adverse employment action. *McDonnell-Douglas* is "simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proven that, in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco Constr. Corp. v. Aikens*, 438 U.S. 711, 580 (1983); *Teamsters*, 431 U.S. at 358 n.44. Accordingly, the

[7] The *McDonnell-Douglas* formula is silent regarding the characteristics of the replacement because in that case no evidence was presented showing that the plaintiff had been replaced. *See Green v. McDonnell-Douglas Co.*, 318 F. Supp. 846 (E.D. Mo. 1970), and *Green v. McDonnell-Douglas Co.*, 463 F.2d 337 (8th Cir. 1972).

McDonnell-Douglas formula is a statement of probabilities based on common sense and experience. *Furnco*, 438 U.S. at 577; *Price Waterhouse v. Hopkins*, 490 U.S. 28, 267 (1989).

The guiding principle of *McDonnell-Douglas* is that the "employee must show circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. Thus, in the ADEA replacement scenario, the Chamber submits that the fourth element of *McDonnell-Douglas* should be modified to require facts justifying an inference of unlawful employer motive.[8] "[The] absolute and relative ages of the [plaintiff] and his replacement have obvious relevance in assessing whether a factual inference of age discrimination is permissible."[9] *Lovelace*

[8] As the Court has noted repeatedly, the *McDonnell-Douglas* test is to be modified to fit the myriad fact situations that arise in the employment context. *Burdine*, 450 U.S. at 253 n.6. The Court in fact has modified other elements of the *McDonnell-Douglas* framework to accommodate differing fact situations. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). The logic of those cases applies with equal force here. Thus, the original statement of the *McDonnell-Douglas* formulation should not be mechanically adhered to when the plaintiff has in fact been replaced.

[9] Petitioner states, without authority, that "[T]he Court has repeatedly accepted the proposition that a prima facie case may exist without any regard for the identity of the replacement employee." (Pet. Br. 15-16). It simply is not accurate to state that, in applying *McDonnell-Douglas* in ADEA cases where there is a replacement, this Court has concluded that the replacement's identity is not relevant. This is the first case in which the issue has been posed squarely.

Additionally, the EEOC's reliance on *Connecticut v. Teal*, 457 U.S. 440 (1982), as support for the view that the nature of the replacement is irrelevant is misplaced. *Teal* was a disparate *impact* case. At issue was the employer's "bottom line" defense. The Court held there that a racially-balanced workforce did not excuse the employer's use of selection criteria that had a racially adverse impact. The Court said nothing about the role of replacements in the *McDonnell-Douglas* framework.

v. Sherwin-Williams, 681 F.2d 230, 242 n.13 (4th Cir. 1982). For example, when a plaintiff is replaced by another worker of comparable age, there is little, if any, justification for allowing an inference of unlawful employer intent.[10] Common sense and common experience dictate that an employer who was so biased against older workers that it discharged an employee because of age would not turn around and replace the employee with another of like age.[11] As the Court observed in *Price Waterhouse v. Hopkins*, 490 U.S. at 241, "[W]e need not leave our common sense at the doorstep when we interpret a statute." Obviously, the same is true for applying a judicially-created scheme of proof. Accordingly, to allow an inference of unlawful motive while ignoring the

[10] *Amici* AARP and the EEOC argue that the age of the replacement should not be part of the *McDonnell-Douglas* elements because an employer might replace an employee with an older employee in order to mask discrimination and to ward off a lawsuit. (AARP Br. 20; EEOC Br. 17). Again, these *Amici* misunderstand the issue here at stake and forget that there are *two* ways by which a plaintiff can prove a prima facie case. *See McDonald v. Santa Fe Trail Transp.*, 427 U.S. at 279 n.6. The Chamber submits that, in such situation, a plaintiff should not be allowed to rely on the *McDonnell-Douglas* framework because the ages in question would not support an inference of unlawful employer intent.

[11] It is simply illogical to contend, as *Amicus* AARP does, that "characteristics of the replacement will have no bearing on the employer's discriminatory intent." (AARP Br. 10). For example, logic compels the conclusion that if a 50-year old employee is replaced by a 50-year old employee, then the age of the discharged worker almost certainly was not the motivating characteristic. Thus, an employer might replace a 50-year old employee with another 50-year old person as a cost savings measure because the discharged employee was "close to vesting" under the employer's pension plan. Indeed, this Court recently held that such an employment action would not constitute discriminatory treatment violative of the ADEA. *Hazen Paper v. Biggins*, 113 S. Ct. at 1707. Rather, it is a decision based on a factor other than age. *Id.* The same conclusion presumably would be reached when employees of similar age have different years of seniority, experience or training and such characteristics prompted the employer's action.

available evidence of the replacement's age is to base the initial determination of unlawful motive on conjecture and not on a rational assessment of the probabilities, a result at odds with the logic of *McDonnell-Douglas*.

Furthermore, *McDonnell-Douglas* was based on the premise that available evidence would eliminate the two most legitimate reasons for the discharge. If available evidence, including the replacement's age, also eliminates the alleged *illegimate* basis for the discharge, then common sense and logic dictate that the replacement's age should be considered too.

B. Appropriate Modification of *McDonnell-Douglas* for ADEA Cases

It is the Chamber's position that, in ADEA cases, this Court should draw a bright line between the plaintiff's age and the replacement's age.

The lower courts often have noted the difficulty they have experienced in applying *McDonnell-Douglas* in ADEA cases. The Seventh Circuit recently noted that it has developed no fewer than four different statements of the *McDonnell-Douglas* prima facie case requirements in ADEA cases involving discharges. *See Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 153 n.2 (7th Cir.), *cert. denied*, 115 S. Ct. 1372 (1994). Even *Amicus* AARP acknowledges that the lower courts have struggled in adapting the fourth element of *McDonnell-Douglas* to ADEA cases. (AARP Br. 9 n.6). This struggle has resulted in inconsistent decisions both between and within the circuit courts and a total lack of uniformity in administering the federal statute. A bright line standard will provide clear guidance for both courts and litigants.

Furthermore, a bright line is necessary because age is not a discrete, immutable characteristic, like race or gender, which separates members within the protected group indelibly from persons outside the protected group.

Carter v. City of Miami, 870 F.2d 578, 583 (11th Cir. 1980). Instead, it has shades and gradations. Absent a clear, albeit somewhat arbitrary, line, age distinctions are ephemeral.[12]

1. *Replacement Is Outside the Protected Class*

This Court, consistent with the Fourth Circuit's holding below, should adopt a bright line requirement that a plaintiff must show that the replacement employee is outside the protected class in order to be entitled to the benefits of a *McDonnell-Douglas* inference of illegal motive.

By its terms, the ADEA prohibits discrimination only against older employees, and it defines that group as persons 40 years and older. 29 U.S.C. Section 631(a). To justify an inference of unlawful employer motive under *McDonnell-Douglas*, therefore, a plaintiff necessarily should show that someone lacking the protected characteristic, *i.e.*, someone younger than 40 years old, was treated more favorably.

Furthermore, Congress's intent in passing the ADEA was to eliminate practices which operated to disadvantage the employment opportunities of the class of workers protected by the Act.[13] "[T]he primary purpose of the [ADEA] was to facilitate the hiring of older workers."

[12] The ADEA itself establishes an arbitrary age limit restricting its protections to persons 40 years and older. It was recognized during the hearings on the Act that, "[E]very time you set an arbitrary limit there is abuse, someone will be discriminated against . . . and there is no remedy. But I think that is a risk and we have to confine ourselves to reasonable limits." *Age Discrimination in Employment Act: Hearings on H.R. 13054 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 74-76 (1967) (Statement of Mr. Pestillo).

[13] *See* H.R. Rep. No. 805, accompanying H.R. 13054 (Age Discrimination in Employment Act of 1967), Oct. 23, 1967, 90th Cong., 1st Sess., pp. 1, 7; S. Rep. 723, accompanying S. 830, Nov. 11, 1967, 90th Cong. 1st Sess., p. 1.

United Air Lines Inc. v. McMann, 434 U.S. 192, 210-211 (1977). *See also EEOC v. Wyoming*, 460 U.S. 226, 231 n.3 (1983). Thus, when a plaintiff's replacement also is a member of the protected class, a judicial inference of illegal motive is not justified. This is so because when a member of the protected class is the replacement, he is enjoying the very employment opportunities which the ADEA was intended to foster. In such situations, the legislation's intent, rather than being undermined, actually is being enhanced.

Petitioner and its *Amici* cite to legislative history of the ADEA and an EEOC regulation interpreting the ADEA and conclude that the ADEA protects workers from discrimination on the basis of age, not just discrimination in favor of persons under the age of 40. That may be so, but it is not at all relevant to the question at issue of how the *McDonnell-Douglas* scheme should be formulated when the plaintiff has been replaced. Neither the ADEA's legislative history nor its regulations speak to this issue, *McDonnell-Douglas* being a judicial creation.

Accordingly, it is consistent with the basic rationale of *McDonnell-Douglas*, viewed in light of the fundamental goals of the ADEA, to modify its fourth element, in the replacement context, to require a plaintiff to demonstrate that the replacement was outside the protected class.

2. *Replacement Is "Substantially Younger"*

An alternative bright line would be a modification of *McDonnell-Douglas*'s fourth element to require a plaintiff to show that the replacement is a "substantially" younger person.[14] Such a requirement, the Chamber submits, is

[14] Several lower courts have adopted a "substantially" younger standard. *See, e.g., Maxfield v. Sinclair Intern.*, 766 F.2d 788 (3rd Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435 (11th Cir. 1985); *Haskell v. Kamar Corp.*, 743 F.2d 113, 122 (2nd Cir. 1984); *Douglas v. Anderson*, 656 F.2d 528, 533 (9th Cir. 1981).

the minimum necessary to justify an inference of unlawful employer intent under the ADEA.

It is obvious that when a replacement is of equal or greater age than the plaintiff, no inference of illegal intent can be justified. The same is true if the replacement is younger, but only slightly so. For these reasons, the Chamber submits that, at a minimum, the age disparity between the plaintiff and the replacement should be sufficiently great to create a reasonable inference that the employer's decision was because of the age of the employee. *Roper v. Peabody Coal Co.*, 47 F.3d 925, 927 (7th Cir. 1995); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506 (5th Cir. 1988).[15]

It is not enough, however, to adopt such a broad and loose definition of the plaintiff's required showing. Given that the *McDonnell-Douglas* scheme is a judicial construct, it would be appropriate for the Court to present lower courts with a meaningful way to apply the "substantial" disparity standard. Indeed, in the Title VII context, the Court has declared that when "approv[ing] the use of disparate impact analysis in evaluating subjective selection practices . . . [it] requires us to provide the lower courts with appropriate evidentiary guidelines." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 n.2 (1988). Similarly, the Chamber respectfully suggests that it would be appropriate for the Court to establish plain and reasonable evidentiary guidelines that will effectuate the goals of the ADEA without exhausting the parties' resources through endless litigation.

[15] In disparate impact cases, where an inference of unlawful employer action is allowed based on statistical proof, this Court has required that the disparity be "significant" or "substantial." *See, e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308 (1977); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 435 (1975); *McDonnell-Douglas v. Green*, 411 U.S. at 805; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See also* EEOC regulations at 29 C.F.R. Sections 1607.5(b)(3) & (4).

Accordingly, if the Court does not adopt a standard requiring the replacement to be outside the protected class, the Chamber urges the Court to require that, for the purposes of the *McDonnell-Douglas* formulation, a plaintiff can establish that the replacement was "substantially younger" only by showing that the replacement was at least ten years younger.

A ten-year disparity standard is supported by both the Act's legislative history and the EEOC regulations, both of which refer to an age disparity of ten years as constituting ADEA discrimination.[16] Both references, moreover, comport with what common sense and experience suggest, that replacement by an individual who is less than ten years younger than a plaintiff does not create a sufficiently strong inference of unlawful motivation to justify shifting the burden to the employer to defend its actions.

Requiring a plaintiff to establish the replacement's age in order to take advantage of the *McDonnell-Douglas* inferences is not unduly burdensome. First, the age of the replacement is a readily available and easily proven, objective fact. Unlike direct evidence of motive, it is not evidence exclusively within the employer's control and inaccessible to a plaintiff. Practically speaking, the consequence of such a requirement for the plaintiff would be negligible, certainly "not onerous." *See Burdine*, 450 U.S. at 253.

On the other hand, the burden which shifts to an employer after a plaintiff makes a prima facie case is significant, weighty and costly, and should be imposed on the

[16] Senator Javits commented "[I]f two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 solely . . . because he is younger than the man 52, then he will have violated the act." 113 Cong. Rec. 31,255 (1967) (statement of Senator Jacob Javits). The EEOC regulation provides that "if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age." 29 C.F.R. Section 1625.2(a).

employer only when the available facts, including the replacement's age, point to an improper motive.[17]

Further, this requirement in no way limits the cause of action or restricts the age protections provided by the ADEA. Contrary to the apparent misunderstanding of Petitioner and his *Amici*,[18] the Chamber is not suggesting that the Court should redefine the cause of action and declare that a plaintiff can establish unlawful age discrimination only if the replacement is of a certain age. Instead, the Chamber's position is that for an ADEA plaintiff to be entitled to the obvious benefits of the *McDonnell-Douglas* scheme, more is required than a mere showing that the plaintiff has been replaced.

A clear result of the Chamber's suggestion is that ADEA plaintiffs with unmeritorious cases will not succeed in establishing a prima facie case through invocation of *McDonnell-Douglas*. Absent consideration of the replacement's age, virtually any protected employee can make out a prima facie case under *McDonnell-Douglas*, as originally formulated, by simply showing membership in the protected class. Thus, almost every adverse action involving an employee over age 40 has a a tendency to become a federal employment discrimination case. Nothing in the ADEA supports such an untoward result.

By restricting establishment of a *McDonnell-Douglas* prima facie case, numerous baseless lawsuits will be elim-

[17] After the plaintiff makes the prima facie case, the employer must produce a legitimate reason for its actions. "To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the [adverse employment action]." Burdine, 450 U.S. at 255. "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or argument of counsel." *Id. See also USPS v. Aikens*, 460 U.S. at 714-715. At a minimum, the defendant's burden necessarily almost always will involve substantial discovery, and most likely, participation in a hearing wherein it must offer some direct evidence.

[18] Pt. Br. 17-20; EEOC Br. 9-12; AARP Br. 16-21.

inated at an early stage. "Pointless litigation burdens both the parties and the federal courts." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981). Adoption of the bright line approach urged by the Chamber, and thereby reinvigorating the *McDonnell-Douglas* standard in ADEA cases, will help relieve the unwarranted stress on the courts and the legal system that have resulted from the diluted standard of shifting burdens countenanced by some circuit courts.

II. THE DECISION IN THIS CASE IS RELEVANT TO THE SAME ISSUE IN TITLE VII CASES.

In determining the role of replacements under *McDonnell-Douglas* in ADEA cases, the Court simultaneously will impact the burden shifting scheme in Title VII cases.[19]

As noted above, the Court has stated that the *McDonnell-Douglas* proof scheme is equally applicable to both Title VII and ADEA cases. Moreover, Justice Souter has noted that "[t]his Court has not directly addressed the question whether the characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today." *Hicks*, 113 S. Ct. at 2758 n.1 (Souter, J., dissenting).[20]

Accordingly, whatever approach the Court adopts in the instant case regarding the issue of the replacement's age will have relevance with respect to a replacement's characteristics in Title VII cases. For example, should the Court now conclude that the replacement's age is irrelevant under the *McDonnell-Douglas* scheme in ADEA cases, it could be argued plausibly in a Title VII race case that the replacement's race also is irrelevant under the

[19] 42 U.S.C. §§ 2000e *et seq.*

[20] On several occasions, however, this Court has noted the characteristics of the replacement when reviewing the plaintiff's prima facie case under Title VII. *See, e.g., USPS v. Aikens, supra*, 460 U.S. at 714; *Hicks, supra*, 113 S. Ct. at 2747.

McDonnell-Douglas formulation.[21] The same would be true regarding claims of unlawful discrimination on the basis of gender, religion, or national origin. Viewed in this light, and considering the very purposes of the anti-discrimination laws, the characteristics of a replacement employee become a vital fact that must be taken into account under *McDonnell-Douglas* if employers and the courts are to avoid an additional torrent of meritless discrimination litigation.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce urges the Court to affirm the judgment of the United States Court of Appeals for the Fourth Circuit or to enter an appropriate modifying order.

Respectfully submitted,

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[21] There appears to be a split among the courts of appeals regarding whether the characteristics of the replacement are relevant in Title VII cases. *Compare, e.g., Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 944-945 (8th Cir. 1994) (holding replacement is not relevant) with *Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 548 (6th Cir. 1991) (holding replacement is relevant. *See also* cases cited in footnote 5 of the *amicus* brief of the EEOC.

(9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES O'CONNOR,
Petitioner,

v.

CONSOLIDATED COIN CATERERS CORPORATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The written consent of all the parties have been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of the respondent.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations, as well as several

associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, and the constituents of its trade association members, are subject to the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (ADEA), and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) (Title VII). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration regarding the application of the *McDonnell Douglas* standards for a prima facie case in the age discrimination context. The Fourth Circuit held that the plaintiff in this case had not met the threshold requirement of proving that he was performing at a level that was substantially equivalent to the lowest level of the employees who were retained during a corporate restructuring. Indeed, the court found that those retained were performing at a significantly higher level than the plaintiff. The plaintiff, however, argues that proof of relative qualifications should not be a part of his prima facie burden—a position that is contrary to the ADEA and the decided cases.

Because of its interest in issues involving the standard of proof in Title VII cases, EEAC has filed

briefs as *amicus curiae* in numerous cases before this Court, including *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Connecticut v. Teal*, 457 U.S. 440 (1982); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

Furthermore, a number of the other cases in which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993); *Trans-World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575 (1978); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989); and *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). Because of its experience, EEAC is well-suited to brief the Court on the importance of the issues here beyond the immediate concerns of the parties. This brief brings matter to the Court's attention that has not already been provided by the party briefs.

STATEMENT OF THE CASE

The plaintiff, James O'Connor, brought this lawsuit pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634. He contends that he was terminated because of his age by his employer, Consolidated Coin Caterers Corp., (Consolidated), which is a division of Canteen Corporation (Canteen). The district court granted

summary judgment in favor of Consolidated because O'Connor had failed to establish a prima facie case. The district court's ruling was affirmed by the Fourth Circuit.

Consolidated operates cafeterias and vending machines for industrial plants, businesses, schools and health care facilities. (Pet. App. at 2-3).[1] O'Connor was the supervisor of one of Consolidated's regional operations. In 1990, Canteen restructured its operations and changed the makeup of its operating territories by combining them into larger territories. (Pet. App. at 3-6).

As a result of this reorganization, two supervisors were adversely affected. O'Connor (age 56) was discharged; and Allen Hunter (age 57) was reassigned. Canteen chose Ted Finnel (age 40) and Mike Kiser (age 35) to manage the newly-expanded districts. (Pet. App. at 5). According to Canteen, Finnel and Kiser were selected to manage the new districts because "there were substantially greater management responsibilities than had been required under the previous organizations and the new districts were substantially larger in geographic area." (Pet. App. 5).

Finnel and Kiser were selected because their former direct supervisor "had first-hand knowledge of both men's work and abilities, and considered them competent to handle the greater responsibilities and larger geographic territory." (*Id.*) Consolidated did not select plaintiff O'Connor because he was slow in responding to problem accounts in his old territory, and the new territories "served a greater number of

[1] "Pet. App." references are to the appendix to O'Connor's Petition for Writ of Certiorari.

customers, entailed more accounts and covered a substantially larger geographic territory." (*Id.* at 5-6). "Given that O'Connor was slow with his already reduced territory [i.e., from six to three geographic units], Consolidated concluded that he could not handle an even larger district." (*Id.* at 6).

O'Connor asserted instead that he was discharged because of his age. The district court, however, granted Consolidated's motion for summary judgment, and that ruling was affirmed by the Fourth Circuit. The Fourth Circuit stated that in order to succeed, the plaintiff has to prove by a preponderance of the evidence that "but for Consolidated's motive to discriminate against him because of his age, he would not have been discharged." (Pet. App. at 8).

Because O'Connor lacked direct proof of age discrimination, he attempted to use the indirect method to establish a prima facie case. In this regard, the Fourth Circuit used the following test patterned after *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), but modified for age discrimination cases. Under this test, the plaintiff can establish a prima facie case if he can prove:

> (1) the employee was protected by the ADEA; (2) he was selected for discharge from a larger group of candidates; (3) *he was performing at a level substantially equivalent to the lowest level of those of the group retained*; and (4) the process of selection produced a residual workforce containing some unprotected persons *who were performing at a level lower than that at which he was performing.*

(Pet. App. at 9-11 (emphasis added)).

Although O'Connor met the first two standards, the Fourth Circuit held that he did not meet the

requirements of the third prong applicable to age discrimination termination/replacement and reduction-in-force cases:

> The third element requires that O'Connor perform at a level substantially equivalent to the lowest level of those of the group retained. Essentially, this element demands that O'Connor perform his job satisfactorily, thereby meeting Consolidated's legitimate expectations. According to Consolidated, O'Connor cannot satisfy this element because even prior to the reorganization that gave rise to the new district manager positions, O'Connor was slow in dealing with problem accounts, his territorial responsibilities had already been greatly reduced, and he experienced a problem with food delivery in an unrefrigerated truck.

(Pet. App. at 11-12).

The court stated that O'Connor had failed to prove that Consolidated did not treat age neutrally in discharging him, especially because O'Connor was not comparable to Kiser or Finnel who had performed their jobs as expected, whereas O'Connor's territory was reduced prior to his termination due to his slow response to problem accounts. (Pet. App. at 13-14). Thus, the decision to discharge O'Connor was not based on age discrimination, "but rather on the age-neutral reason that O'Connor's performance did not recommend him for the job, while Finnel and Kiser's did." (Pet. App. at 14).

The Fourth Circuit then stated that the fourth prong of the prima facie test required O'Connor to prove that "persons outside the protected class [i.e., persons age-39 or less] were retained in the same position." (Pet. App. at 13). This ruling has been

seized upon by the plaintiffs in framing the question to be decided by the Court. But, the Fourth Circuit also noted that O'Connor could not meet the third prong of the requirements for a prima facie case, i.e., he did not show that "he was performing a level substantially equivalent to the lowest level of those of the group retained." (Pet. App. at 11). Therefore, the presence or absence of a comparator employee outside the age group protected by the ADEA is not as important a factor as O'Connor argues here, since he lacked the relative qualifications to allow him to establish a prima facie case in any event.

Thus, the *amicus curiae* will address the Fourth Circuit's ruling that in establishing a prima facie case, the plaintiff must meet the burden of proving that his performance level was substantially equivalent to that of the employees who were retained.

SUMMARY OF ARGUMENT

The plaintiff argues to this Court that he should be relieved of the prima facie burden of proving that he was performing at a level substantially equivalent to those who were retained during a corporate restructuring. The Fourth Circuit clearly was correct in rejecting that position.

The central purpose of the *McDonnell Douglas* standards is to eliminate one of the most common nondiscriminatory reasons for the discharge of an individual in a protected class: "the absolute or relative lack of qualifications" for the job. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). To establish a prima facie case, the plaintiff, at minimum, should have to prove that he "was performing to his employer's legitimate expectations." *Collier v. Budd Co.*, 66 F.3d 886, 889 (7th

Cir. 1995). Also, the plaintiff should not be able to establish a prima facie case unless he can establish that those who were retained in the position that he wanted were performing at a lower level than the plaintiff. *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993). Because O'Connor failed to establish his qualifications, the Fourth Circuit properly dismissed his suit.

In reading the qualifications requirement out of the *McDonnell Douglas* standards, the plaintiff is attempting to prove his initial case on the basis that he was terminated and younger workers were retained. A mere age difference, however, is not sufficient to fulfill the plaintiff's burden.

> But it simply cannot be enough in a termination case that the employer merely retain[s] younger employees. If that were enough, practically any terminated employee in a protected class could make out a prima facie case of age discrimination, since most companies will retain at least some employees under age 40.

Gadsby v. Norwalk Furniture Corp., No. 95-1507, 1995 U.S. App. LEXIS 35229, at *26 (7th Cir. Dec. 13, 1995).

Finally, without a qualification requirement, plaintiffs would be encouraged to rely only on age-differential statistics in an attempt either to prove class-wide discrimination or to bolster an argument that an individual plaintiff was a victim of age discriminaton. In other words, plaintiffs would be encouraged to use "disparate impact" statistics to prove age discrimination. This Court has never authorized that theory under the ADEA, and several justices and lower courts have opposed its use. *See Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706, 1710

(1993); *Ellis v. United Airlines, Inc.*, No. 94-1351 and 95-1034, 1996 U.S. App. Lexis 120, at *23-34 (10th Cir. 1996) (Rejecting disparate impact proof under the ADEA).

Because the plaintiff failed to demonstrate that he possessed qualifications sufficiently equivalent to the retained employees, he did not sustain the burden necessary to prove a prima facie case.

ARGUMENT

I. TO ESTABLISH A PRIMA FACIE CASE OF AGE DISCRIMINATION IN THE CONTEXT OF A CORPORATE REORGANIZATION, THE PLAINTIFF MUST ESTABLISH THAT S/HE WAS PERFORMING AT A LEVEL SUBSTANTIALLY EQUIVALENT TO THOSE RETAINED.

A. Contrary to the Numerous Cases Applying *McDonnell Douglas v. Green*, the Plaintiff Here Is Attempting to Let an Age Difference Establish a Prima Facie Case and to Eliminate the Longstanding *Prima Facie* Requirement That the Plaintiff Establish Performance Credentials That Are Equivalent or Superior to the Comparators Who Were Retained.

The ostensible issue that the plaintiff presented for review by this Court is whether a plaintiff in an age discrimination lawsuit must establish: "that he was replaced by a younger person or that a younger person was retained in a similar position, or must show that he was replaced by someone outside the protected class." (Pet. at i). Indeed, the plaintiff and supporting *amici curiae* spend a great deal of effort arguing various extreme hypotheticals posing whether a 65-year old discharged plaintiff could be the victim of age discrimination when replaced either by a 39-year old (i.e., outside the protected group), or a 41-year old (i.e., inside the protected age group).

Actually, the plaintiff is attempting to have this Court adopt an improper prima facie test in which *an age difference alone would suffice* to establish a prima facie case, and any consideration of relative qualifications would be dropped from the plaintiff's burden of proof. The question presented by the petitioner presumes that a prima facie case could be shown by age differences alone. Also, the petitioner argues that:

> Any requirement that characteristics of the replacement be shown as part of the prima facie case will in effect abolish the presumptive character of the prima facie case, and leave discrimination complainants with the very burden of making out a traditional circumstantial case that it was the purpose of the prima facie case to remove.

(Br. for Pet'r at 16, 21).

Thus, in arguing the issue presented, the petitioner subtly has tried to shift the inquiry in such a way as to avoid one of the principal findings underpinning the ADEA, which is to prevent the setting of arbitrary age limits "regardless of potential for job performance." 29 U.S.C. § 621(a)(2). Also, the petitioner's position is contrary to the central purpose of the *McDonnell Douglas* standard, that is, to eliminate one of most common nondiscriminatory reasons for the discharge of an individual in a protected class: "the absolute or relative lack of qualifications" for the job. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n. 44 (1977).

This standard requires the plaintiff to prove "that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants *with qualifications similar to the plaintiff's.*" *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 987 (1988). *A fortiori*, if the persons retained were more qualified than the plaintiff, then the plaintiff's initial burden cannot be met.

Of course, if this traditional route is followed in this case, the plaintiff will lose. As both the district court and Fourth Circuit pointed out, the evidence shows that O'Connor cannot prove that he was as qualified as those employees who were retained. Indeed, his past performance supervising a significantly less complex territory indicated that his qualifications were substantially inferior to those of the employees who were retained and given expanded responsibilities.

In essence, the plaintiff wants this Court to let him establish a *prima facie* case without any consideration of how his qualifications stack up against those who were retained, even though this is the only meaningful way to apply the *McDonnell Douglas* test. Under O'Connor's position, the only burden the plaintiff should be required to meet is to show that the employees who were retained were sufficiently younger than he was. As we show below, however, the Court should reject this attempt to rewrite the *McDonnell Douglas* test and should clarify that an age difference alone is not sufficient to allow the plaintiff to proceed in court.

B. To Establish an ADEA Prima Facie Case, the Plaintiff Bears the Burden of Proving Qualifications for the Job in Question.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. Similarly, the Age Discrimination in

Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, prohibits discrimination on the basis of age. 29 U.S.C. § 623. Neither statute, however, authorizes recovery merely because an employer's legitimate exercise of managerial discretion adversely affects a member of a protected group.[2] Both Title VII and the ADEA provide a remedy only when the action complained of was taken "because of" the illegal criterion.[3] Thus,

> Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (1993).

In a series of decisions beginning with *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and continuing through *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), this Court has developed a method to allow a plaintiff in appropriate cases to demonstrate disparate treatment and violation of employment discrimination laws "despite the

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[2] "The ADEA is not a vehicle for reviewing the propriety of business decisions. . . . [t]his court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives." *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1427 (10th Cir. 1993).

[3] Under § 703(a) of Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "*because of* such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2 (emphasis added). The ADEA prohibits discrimination against any individual "*because of* such individual's age." 29 U.S.C. § 623(a) (emphasis added).

unavailability of direct evidence." *Trans-World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)). Recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), so that direct, "smoking gun" evidence is often unavailable, this Court has instead developed "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

McDonnell Douglas established the basic order of proof. As this Court explained in *Burdine*, the plaintiff first must establish a *prima facie* case; the employer then is given an opportunity to "articulate" some legitimate, nondiscriminatory reasons for its actions; and, if that is done, the plaintiff then must prove that the employer's stated reasons were "pretextual." *Burdine*, 450 U.S. at 252-53. The "ultimate burden" of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff "remains at all times with the plaintiff." 450 U.S. at 253.

The *McDonnell Douglas* decision enumerated the generic factors that make up the plaintiff's prima facie case of discrimination. Thus the plaintiff must prove:

> (i) that he belongs to a racial minority; (ii) that he applied and was *qualified* for a job for which the employer was seeking applicants; (iii) that, despite his *qualifications*, he was rejected; and that, after his rejection, the position remained open and the employer continued to seek

> applicants from persons of complainant's *qualifications*.

411 U.S. at 802 (emphasis added). The specific requirements, however, can vary from case to case, depending upon the employment action and statute at issue. *McDonnell Douglas*, 411 U.S. at 802 n.13.

The plaintiff, however, must satisfy one basic element, no matter the context. This method of establishing a prima facie case is intended to eliminate "the most common non-discriminatory reasons for the plaintiff's rejection," *Burdine*, 450 U.S. at 254, such as the plaintiff's *lack of qualifications* or the unavailability of the position. Here the plaintiff's "lack of qualifications" is crucial to the case.

In applying the *McDonnell Douglas* standard to ADEA cases involving reductions in force of reorganizations, the courts have recognized that the primary issue is the "relative performance" of the plaintiff and retained employees, since many of the employees may have been meeting existing performance standards before the employer decided to eliminate positions and choose among many previously qualified candidates. *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993).

In such a situation, the plaintiff, at minimum, should have to prove that he "was performing to his employer's legitimate expectations." *Collier v. Budd Co.*, 66 F.3d 886, 889 (7th Cir. 1995). "[T]he more appropriate concern in a discharge case is job performance, into which the question of qualifications merges." *Oxman v. WLS-TV*, 846 F.2d 448, 452 n.2 (7th Cir. 1988). And surely, the plaintiff also should not be able to establish a prima facie case if he was performing at lower level than the employees who

were retained. *Mitchell v. Data General*, 12 F.3d at 1315. Thus, the Fourth Circuit's test properly requires the plaintiff to prove that his performance was substantially equivalent to other employees retained during a corporate restructuring or reorganization.[4]

This construction is supported by this Court's major decisions construing *McDonnell Douglas*, which emphasize that simple membership in a protected group does not by itself establish a prima facie case, and that "qualifications" for the position in question is crucial to surviving a motion for summary judgment or a motion to dismiss. For example, the *Griggs* decision stated:

> Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed the very purpose of Title VII is to promote hiring on the basis of job qualifications rather than on the basis of race or color.

Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) (emphasis in the original). *Griggs* also stated that "[a]n employer may set his qualifications as high as he likes, *id.* at 434 n.11, . . . and that selection proce-

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[4] *See also Dietrich v. Canadian Pac. Ltd.*, 66 Empl. Prac. Dec. (CCH) ¶ 43,721 at 83,569-83,570 (Minn. 1995) ("The plaintiff offers no evidence that the employees who absorbed her duties were in fact less qualified. . . . 'the fact that a younger worker is retained after a reduction or reorganization in force is insufficient in itself to establish a *prima facie* case of age discrimination.' ")

dures are not forbidden if they "are demonstrably a reasonable measure of job performance." *Id.* at 435.

Picking up on the qualifications theme, the *McDonnell Douglas* decision cited further language from *Griggs* emphasizing the importance of qualifications:

> Congress did not intend by Title VII, however, to guarantee a job to every person *regardless of qualifications*. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.

411 U.S. at 801, citing *Griggs*, 401 U.S. at 430-31.

And as noted above, the *Teamsters* decision stated that the employer's decision to reject a person who belongs to a racial minority does not show that the rejection was racially based. Beyond that, the *McDonnell Douglas* decision "does demand that the alleged discriminatee *demonstrate* at least that his rejection did not result from one of the most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or *relative* lack of qualifications. . . ." *Teamsters*, 431 U.S. at 358 n.44.

In *Burdine*, this Court reasserted the strong emphasis on qualifications. That decision stated that "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position *for which she was qualified.*" 450 U.S. at 253. Similarly, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243-44 (1989), the Court set out at some length Congress' intent that the inquiry would "focus on the *qualifications* of the applicant or employee. The intent to drive employers to focus on *qualifications*

rather than on race, [etc.], is the theme of a good deal of the statute's legislative history." *Id.* (emphasis added). Thus, while a forbidden characteristic may not play a part in the employer's decision, "[a]ny other criterion or qualification for employment is not affected by this title." *Id.* at 244.

As the discussion in this section demonstrates, O'Connor's attempts to remove the relative qualifications issue from the plaintiff's prima facie burden is contrary to the intent of Congress and the many decisions of this Court.

C. An Age Differential Between the Plaintiff and the Retained Employees Is Not Sufficient to Establish a Prima Facie Case of Age Discrimination.

As previously explained, if relative qualifications were not part of the plaintiff's prima facie burden, then the plaintiff would find it much easier to argue that an age differential alone is sufficient to establish an initial case of age discrimination. O'Connor ultimately is relying on the fact that he was terminated and that younger supervisors were not.

> But it simply cannot be enough in a termination case that the employer merely retain[s] younger employees. If that were enough, practically any terminated employee in a protected class could make out a prima facie case of age discrimination, since most companies will retain at least some employees under age 40. Accordingly, [the plaintiff] has failed to satisfy even the more permissive formulation of the fourth factor of the prima facie case.

Gadsby v. Norwalk Furniture Corp., No. 95-1507, 1995 U.S. App. LEXIS 35229, at *26 (7th Cir. Dec. 13, 1995).

This Court's recent decision in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), provides analogous support for the proposition that age-related suppositions often are insufficient to raise an inference of impermissible age discrimination. Walter Biggins was discharged in that case because his employer concluded that he was doing unauthorized business with competitors. Although Biggins was not replaced by a younger worker, he tried to use an age-related "proxy", claiming that the real reason he was fired was to prevent his pension from vesting. The Court disagreed, however, holding that there will be instances when no age discrimination is found even though the motivating factor may be correlated with age, as often is the case with pension eligibility. 113 S. Ct. at 1707.[5] Certainly, if a prima facie case cannot be established when the employer relies on a factor that may be correlated with age, then a plaintiff cannot establish a prima facie case based upon age differentials alone without any proof connecting the employer's decision with age-related factors.

The reasons for thwarting attempts to base age discrimination suits on age comparisons were set out several years ago by the Sixth Circuit. *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975). There, the court stated:

> It is also evident from the [House] Report that Congress did not desire that the [Age Discrimination in Employment] Act be applied formalistically:
>
> > "The case by case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions."
>
> The foregoing language suggests that perhaps the more strict approach which is evident in the treatment of a Title VII race discrimination case in McDonnell Douglas v. Green may not be desirable here. *The progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in.* This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex and national origin. *Thus, while the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.*

510 F.2d at 313 n.4 (emphasis added).[6]

A commentator has examined this reasoning further, providing a hypothetical example of why age alone is not sufficient to establish a prima facie case:

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[5] Similarly, the courts have rejected arguments that decisions based on higher salary prove age discrimination, because a correlation between age and higher salary often can be shown. *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 2577 (1995); *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020 (8th Cir. 1994); and *Rosen v. Columbia Univ.*, 68 Fair Empl. Prac. Cas. (BNA) 1190 (S.D.N.Y. 1995).

[6] *See also* Barbara L. Schlei & Paul Grossman, *Employment Discrimination Law* 498-99 (BNA 2d ed. 1983).

This natural process of replacement by younger employees should be considered when determining what a plaintiff must show to establish a prima facie case in ADEA discharge cases. *Since younger workers will normally replace older workers, the establishment of a prima facie case should not turn upon a showing of this fact of replacement alone.* Adoption of such a rule could lead to absurd results. For instance, a fired 68 year old would be able to establish a prima facie case of age discrimination merely by showing he was replaced by someone younger. The chance of his being replaced by an older person is slight when one considers the available labor pool of people over 68. Consequently, allowing the presumption of discriminatory intent appears to be inappropriate for it effectively places the burden on the employer to show nondiscriminatory motive, even though the plaintiff had shown nothing from which discrimination could reasonably be inferred.

* * * *

> In the example given of the discharged 68 year old, it is evident that replaceemnt by someone younger does not support an inference that his discharge was "more likely than not" based on age. *Replacement by one younger also would not be the basis, "more likely than not," in less extreme cases since the natural progression of younger people into the work force is no less a reality.*

Mary Comins Sutton, Comment, *Should McDonnell Douglas Apply in ADEA Cases? The Sixth Circuit's Answer*, 15 Toledo L.R. 1230-31 (Spring, 1984) (emphasis added).

Moreover, should the Court permit plaintiffs to use age differentials to establish a prima facie case of age discrimination, such a ruling might give more

impetus to attempts by the plaintiffs bar to use age-differential statistics to prove either class-wide discrimination or bolster an argument that an individual plaintiff was the victim of age discrimination.

In other words, a prima facie case standard that relieves the plaintiff of any proof of relative qualifications could encourage additional use of the "disparate impact" theory in age discrimination suits. Although this Court has never decided whether a disparate impact theory of liability is available under the ADEA (*see Hazen Paper Company v. Biggins*, 113 S. Ct. 1701, 1706 (1993)), several justices have questioned its use. *See Hazen Paper*, 113 S. Ct. at 1710 (Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas); and *Markham v. Geller*, 451 U.S. 945 (1981) (Justice Rehnquist, dissenting from denial of certiorari). Indeed, the Tenth Circuit recently rejected use of the disparate impact theory under the ADEA. *Ellis v. United Airlines, Inc.*, No. 94-1351 and No. 95-1034, 1996 U.S. App. LEXIS 120, at *23-34 (10th Cir. 1996).

One commentator recognized this danger and cautioned that age-related statistics are not amenable to the disparate impact theory. Even H. Pontz, Comment, *What a Difference the ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C.L. Rev. 266, 315 (1995). After discussing *Laugesen v. Anaconda Co.*, the Comment stated:

> Furthermore, statistics, often the key to disparate impact cases, may be less probative in age cases because of this natural progression in the workplace, whereby older workers retire and younger workers replace them. Therefore, statistics tending to show that older workers are being replaced by younger workers, taken alone, would

> at best be extremely tenuous evidence of age discrimination, and any showing of a statistical disparity may receive less weight in an ADEA case than it would under Title VII. But since statistics are the linchpin of disparate impact claims, *this inherent conflict between the functioning of disparate impact theory and the realities of the real labor market illustrate the inherent flaw in trying to include disparate impact theory under the ADEA.*

Id. at 315-316. *Accord*, Note, *Age Discrimination and the Disparate Impact Theory*, 34 Stan. L.R. 837 (1982). Thus, this case might provide an opportunity for the Court to indicate that age-related statistics alone will not be sufficient to support or bolster a prima facie case age discrimination.

For the reasons stated herein, the Court should clarify the plaintiff's ADEA burden of proof and require the plaintiff to prove that he was performing at the same or higher level than the retained employees as an essential part of his prima facie burden.

CONCLUSION

For the reasons stated herein, EEAC respectfully submits that the decision of the Fourth Circuit below should be affirmed.

Respectfully submitted,

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No. 95-354

In the

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES O'CONNOR,

Petitioner,

v.

CONSOLIDATED COIN CATERERS CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF MARYLAND, ARKANSAS, DELAWARE, MICHIGAN, NEVADA, NEW JERSEY, OKLAHOMA AND SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Can an individual establish a prima facie case that he was discharged on the basis of age when his replacement is within the class of persons protected against age discrimination?

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Sup. Ct. R. 37 1

In the

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-354

JAMES O'CONNOR,

Petitioner,

v.

CONSOLIDATED COIN CATERERS CORP.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE STATES OF MARYLAND, ARKANSAS, DELAWARE, MICHIGAN, NEW JERSEY, NEVADA, OKLAHOMA AND SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

This brief is submitted by the *amici* states through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

INTEREST OF *AMICI CURIAE*

Because the Age Discrimination in Employment Act (ADEA) defines "employer" to include "a state or political subdivision of a state," 29 U.S.C. § 630(b), a state agency that violates the ADEA is liable for both legal and equitable relief. 29 U.S.C. § 626(b) & (c). Institutional employers such as the States, like their private sector counterparts, have an acute interest in knowing the rules that govern ADEA litigants. The States, therefore, have a strong interest in this case because it requires this Court to define the nature of proof needed to establish a prima facie case in causes of action instituted pursuant to the ADEA.

STATEMENT OF THE CASE

James O'Connor initiated the present action pursuant to the ADEA following his discharge from employment with Consolidated Coin Caterers Corporation (Consolidated). *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 543 (4th Cir. 1995). O'Connor was 56 years of age at the time of his discharge; he was replaced by someone who was 40 years of age. *Id.* at 544. The United States District Court for the Western District of North Carolina granted summary judgment in favor of Consolidated, ruling that O'Connor had failed to establish, under the proof scheme enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a prima facie case that Consolidated had done anything other than treat age neutrally in deciding to terminate him. 56 F.3d at 545. The district court went on to hold that O'Connor had likewise failed to establish by traditional proof methods that his discharge was age-based. *Id.*

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment. The court held that O'Connor could not survive summary judgment under the

McDonnell Douglas rubric because the employee who replaced him was outside of the class of persons protected by the ADEA. *Id.* at 547. The court held that O'Connor fared no better in his efforts to offer direct proof that age was the determining factor in Consolidated's decision to discharge him. *Id.* at 549-50. The court found no discriminatory intent was evinced by the age-related remarks that Consolidated allegedly made. *Id.*

Judge Butzner filed a separate opinion concurring in part and dissenting in part. *Id.* at 550-51.

SUMMARY OF ARGUMENT

This Court should adopt the requirement that the court of appeals imposed in this case. Just as discriminatory intent is not manifested when a member of a particular race, national origin, or gender is replaced by a member of the same classification, such intent does not arise under the ADEA when one member of the protected classification replaces another. The rule that the court of appeals used should be affirmed because it parallels the line drawing that Congress engaged in when it enacted the ADEA, and it ensures consistent results when determining whether a party has made out a prima facie case under the ADEA.

ARGUMENT

A PLAINTIFF ALLEGING AN UNLAWFUL VIOLATION OF THE ADEA MUST SHOW, TO ESTABLISH A PRIMA FACIE CASE UNDER THE *MCDONNELL DOUGLAS* CRITERIA, THAT HE WAS REPLACED BY SOMEONE OUTSIDE OF THE PROTECTED AGE GROUP.

The decision of the court of appeals -- that in ADEA cases the plaintiff must focus on the personal characteristics of the person chosen to replace him and show that he or she

was someone outside of the class of persons protected against age discrimination -- should be affirmed for the principal reason that it is consistent with Congress' decision to craft bright lines in limiting the ADEA's protection to those falling within a defined age group.[1] In setting forth that the ADEA is "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment," 29 U.S.C. § 621(b), Congress deliberately chose to have the statute's prohibitions apply only to those individuals at least 40 years of age and less than 65 years of age. 29 U.S.C. § 631(a). This choice sharply distinguishes the ADEA from virtually any other civil rights statute, such as Title VII, for example, which extends its protections to *all* members of a particular race, national origin, gender, or other statutorily defined class.

The test that the court of appeals applied results in no more of an injustice than does that which derives from Congress' decision to delimit the class of plaintiffs eligible for protection under the ADEA. In fact, a bright line rule, requiring a plaintiff to show as an essential part of his prima facie case that he was replaced by someone outside of the class of persons protected by the ADEA, is fully consonant with Congress' drawing of a clear line in limiting the protections of the ADEA to a defined age group.

The court of appeals' requirement also provides an

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[1] The Fourth Circuit is not alone in requiring an ADEA plaintiff to show that he or she was replaced by someone outside of the protected class. The Sixth Circuit adheres to a like view, *see LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993), though it did not always do so as evidenced by a case predating *LaPointe*. *See Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990).

unambiguous, workable rule that, to the exclusion of any other rule, best befits the age characteristic. Requiring that the age of the person chosen to replace the ADEA claimant be outside of the ADEA's protected class, as an essential element of the *McDonnell Douglas* framework, ensures the precise type of objective evidence that provides the basis for a permitted inference of discriminatory intent. The first and third prongs of the *McDonnell Douglas* scheme are no more than standing requirements; the discharge constitutes the cognizable injury, and being a member of the ADEA's protected class satisfies the requirement of being within the ambit of interests protected by the statute. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753 (5th Cir. 1980). The second prong relating to the plaintiff's qualifications for the job, at most, operates to negate a possible rebuttal to the claim of discrimination that has been deemed reasonable to place within the plaintiff's burden of proof. *Id.* A showing that the plaintiff was replaced by someone *outside* the protected class is evidence truly probative of unequal treatment and is, therefore, a relevant consideration.

This type of showing provides the courts with the most effective and trustworthy method by which to deal with age-based discrimination cases predicated on circumstantial evidence. As Petitioner concedes, unlike race or gender, age is not an immutable characteristic. Brief of Petitioner at 17. Age is a matter of degree. It is a continuum. A disparity in age can result from a differential spanning many or a few years, or even only months. It is this quality which compels the bright-line rule employed by the court below.

Amici recognize that other circuits have not required a plaintiff to show as part of his or her prima facie case proof that the replacement employee is outside the protected age group. *See Roper v. Peabody Coal Co.*, 47 F.3d 925, 927

(7th Cir. 1995); *Rinehart v. City of Independence, Mo.*, 35 F.3d 1263, 1266 (8th Cir. 1994); *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1335 n.2 (1st Cir. 1988); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1505 (5th Cir. 1988); *Cooper v. Asplundh Tree Expert Company*, 836 F.2d 1544, 1547 (10th Cir. 1988); *Maxfield v. Sinclair International*, 766 F.2d 788, 792 (3d Cir. 1985); *Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984); *Douglas v. Anderson*, 656 F.2d 528, 532-33 (9th Cir. 1981); *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982). But the tests that have been substituted in place of this requirement are unworkable, inconsistent with one another, and incompatible with the essentially arbitrary line that Congress drew in enacting the ADEA.

For example, both the District of Columbia and the Tenth Circuit Courts of Appeals allow an ADEA claimant to show that he or she was replaced by a "younger" person. *Cuddy v. Carmen*, 694 F.2d at 857; *Cooper*, 836 F.2d at 1547. Under this paradigm, a discharged employee of 49 years of age could establish a prima facie case of age-based discrimination in any case where the person replacing him or her is "younger," even if the age disparity is a year or even less. Stated differently, under the "younger" person approach, an inference of age discrimination would be permitted even where the probative value of such an inference would be virtually nonexistent.

In apparent recognition of the difficulty created by the "younger" person formulation, other circuits have qualified that test somewhat. The Third, Fifth, Seventh, and Eighth Circuit Courts of Appeals require that the employee who replaced the plaintiff be "sufficiently" younger than the plaintiff. *See Maxfield*, 766 F.2d at 792; *Bienkowski*, 851 F.2d at 1505; *Roper*, 47 F.3d at 927; *Rinehart*, 35 F.3d at 1266. The Second and Ninth Circuit Courts of Appeals

require that the plaintiff show that the employee who replaced him or her was "substantially" younger than he or she. *See Haskell*, 743 F.2d at 122; *Douglas v. Anderson*, 656 F.2d at 532-33.

Far from eliminating the difficulty engendered by the "younger" person showing, the "sufficiently" and "substantially" younger requirements only add to the problem. What constitutes a "sufficient" or "substantial" age disparity is an open question. The vagueness inherent in both terms will only inspire irreconcilable results.

In contrast, requiring that a plaintiff show that the person who replaced him or her was someone outside of the protected class provides the sort of meaningful guidance needed when grappling with age-based discrimination claims under the *McDonnell Douglas* rubric. It promotes ease of administration, and leads to a result that renders application of the *McDonnell Douglas* scheme neither mechanistic nor ritualistic. Importantly, it ensures that an inference of discriminatory intent will be drawn in those circumstances warranting such an inference, and eliminates the inconsistent judicial line drawing that courts have engaged in when determining whether a prima facie case has been made out.

The United States and the American Association of Retired Persons, in their respective briefs as *amicus curiae*, contend that the rule applied by the court below runs counter to the proposition stated by this Court in *Connecticut v. Teal*, 457 U.S. 440, 454 (1982), that an employer cannot escape liability for a specific instance of racial discrimination by treating other members of the affected party's racial group favorably. *See* Brief of United States at 15-16; Brief of American Association of Retired Persons at 21. This argument confuses unlawful

discrimination with discriminatory intent. *Teal* was a disparate impact case. In such cases, the focus is on whether the challenged practice has a discriminatory effect.

Here, the focus is on the entirely separate matter of discriminatory intent. As this Court pointed out in *Teal*, "[p]roof that a work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided." 457 U.S. at 454. Likewise, proof that the employee who replaced the ADEA claimant is someone outside of the protected class is relevant insofar as it permits the inference of age-based discrimination to be drawn.

Put simply, *Teal* does not stand for the proposition that unlawful discriminatory intent is evinced when a female employee is replaced with another female, or when an African-American employee is replaced with another African-American. It is equally nonsensical to hold in this case that replacing a discharged employee with someone within the protected age group constitutes impermissible discrimination under the ADEA.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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